Supreme Court, U.S.
FILED

(1) 96 856 OCT 18 1996

No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Fall Term, 1996

VINCENT MAXIMILIAN YEE

Petitioner,

v.

HUGHES AIRCRAFT COMPANY, LARRY SPICER, TERIAN DAY, GAY OSBORN, FRANK TAORMINA, STEVE DORMAN, and SUE HUNGATE

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit by declining to consider a dispositive legal theory supported by the record below raised on appeal incorrectly applied the rule regarding issues first raised on appeal when several circuit courts and the California courts of appeal have recognized a legal theory exception to the general rule.

2. Whether a motion granting summary judgment may be reversed by the court of appeals on a legal theory supported by the esteblished factual record below and recognized by the reviewing court to be valid theory.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....v

OPINIONS RENDERED BY OTHER COURTS.....1

STATEMENT OF JURISDICTION.....1

RELEVANT STAUTES.....1

STATEMENT OF CASE.....1

1. Nature of case.....1

2. Course of proceedings.....2

3. Statement of Facts.....5

ARGUMENT.....19

I. COURTS OF APPEAL HAVE THE AUTHORITY TO ENTERTAIN NEW LEGAL THEORIES ON APPEAL, EVEN THOUGH THE LEGAL THEORY WAS NOT PRESENTED TO THE COURT OF FIRST INSTANCE. 19

A. The Ninth Circuit Court of Appeal had the authority to hear, consider, and rule on the legal theory of continuing violation presented for the first time on appeal regarding the jurisdiction of the district court for the purposes of Mr. Vincent Yee's Title VII discrimination case.....20

B. The factual record from the district court supports the legal theory of continuing violation,

therefore the Ninth Circuit incorrectly affirmed the district court's granting of summary judgment.....22

II. WHEN REVIEWING A MOTION FOR SUMMARY JUDGMENT RULING, THE COURTS OF APPEAL EMPLOY THE DE NOVO STANDARD OF REVIEW AND SHOULD AFFIRM OR DISAFFIRM ON THEORIES SUPPORTED BY THE ESTABLISHED FACTUAL RECORD WHETHER OR NOT THE THEORIES WERE CONSIDERED BY THE DISTRICT COURT.....23

A. The appellate court is not applying a de novo standard of review if the court will affirm but not disaffirm a decision based upon a theory not relied upon by the lower court; the appellate court must both disaffirm and affirm a decision for a true de novo review to occur 25

B. Appellate courts are in a position that promotes decisional accuracy and a more comprehensive analysis of the legal issues involved in a case, therefore the courts are in a position to affirm or disaffirm on legal theories not presented to the court of first instance.....26

CONCLUSION.....29

APPENDIX.....A

1. Relevant sections of Title VII.....A-1

2. Opinion granting motion for summary judgment...A-2

3. Ninth Circuit opinion.....A-3

4. Ninth Circuit oral argument transcript.....A-4

TABLE OF AUTHORITIES

Federal Cases

1. Aetna Ins. Co. v. Loveland Gas & Elec. Co., 369 F.2d 648 (6th Cir. 1966) 24

2. Angel v. Seattle-First National Bank, 653 F.2d 1293 (9th Cir. 1981) 24

3. Atlantic Mutual Insurance Company v.Truck Insurance Exchange, 797 F.2d 1288 (5th Cir. 1986).....20

4. Bailey v. Hartford Fire Ins. Co., 565 F.2d 862 (2nd Cir. 1977) 24

5. Bannum Inc. v. The City of St Charles, MO., 2 F.3d 267 (8th Cir. 1993).....20

6. Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990).....19

7. Church of Scientology of California v. Cazares, 638 F.2d 1272 (5th Cir. 1981).....26

8. Delta-X Corporation v. Baker Hughes Production Tools, Inc., 984 F.2d 410 (Fed. Cir. 1993).....20

9. Diebold v. Civil Serv. Comm'n of St. Louis County, 611 F.2d 697 (8th Cir. 1979).....25

10. Helena Rubenstein, Inc. v. Bau, 433 F.2 1021 (9th Cir. 1970).....26

11. In re Goff, 812 F.2d 931(5th Cir. 1987) 19

12. Kaufman v. Soloman, 524 F.2d 501 (3d Cir. 1975) 24

13. Lindahl v. Air Frmace, 930 F.2d 1434 (9th Cir. 1991) 23

14. Lindley v. Amoco Producion Co., 639 F.2d 671 (10th Cir. 1981).....25

15. Lone Star Steel Co. V. United Mine Workers of America, 851 F.2d 1239 (10th Cir. 1988).....19

16. Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962).....24

17. Ring v. Schlesinger, 502 F.2d 479 (C.A. 1974).....24

18. Rogen v. Ilikon Corp., 361 F.2d 260 (1st Cir. 1966).....24

19. Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).....24

20. Salve Regina College v. Russell, 499 U.S. 225 (1991).....26,27

21. Teumer v. General Motors Corp., 34 F.3d 542 (7th Cir. 1994).....19

22. United Mine Workers v. Gibbs, 388 U.S. 715 (1966)....2

23. U.S. v. Bob Chrislaw, Inc., 341 F.2d 887 (7th Cir. 1965).....24

24. U.S. v. Diebold, Inc., 369 U.S. 654 (1962).....24

25. Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981).....24

26. Yee v. Hughes Aircraft, et. al., case no. CV 93 - 903 MRP(1995).....1,2,28

27. Yee v. Hughes Aircraft, et. al., D.C. No. CV 93 -00903 - MRP (1996).....1,21,23

State Cases

1. Fields v. Blue Shield of California, 209 Cal.Rptr. 781 (Cal.App. 4 Dist. 1985).....20

2. Marsango v. Automobile Club of Southern California, 82 Cal.Rptr. 92 (Cal.App. 2 Dist. 1969).....20

3.. Panopulos v. Maderis, 47 Cal.2d 337 (1956).....20

Statutes

1. 28 U.S.C. § 1254.....1

2. 28 U.S.C. § 12191.....2

3. 42 U.S.C. § 1981.....2,4

4. 42 U.S.C. § 2000 et. seq.....1,2,4

Miscelaneous

1. FRCP 56 (c).....23

2. Ninth Circuit Oral Argument Transcrpt (Appendix, document 4).....21,22,28

A. **Opinions Rendered by other Courts**

1. District Court granting of summary judgment, case no. CV 93 -903 MRP, granted on January 9, 1995.

2. Ninth Circuit Opinion, D.C. No. CV 93 - 00903 - MRP.

B. **Statement of Jurisdiction**

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1254. The Ninth Circuit Court of Appeals rendered its opinion on July 22, 1996.

C. **Relevant Statutes**

1. 42 U.S.C. §2000 et. seq. (1994).

STATEMENT OF THE CASE

A. **Nature of the Case**

This petition for writ of certiorari involves the Title VII action asserted by Mr. Yee against Hughes, concerning Hughes' discriminatory treatment of Mr. Yee while employed by Hughes. The Ninth Circuit affirmed the district court's granting of summary judgment without considering the continuing violation theory put forth by Mr. Yee.

The United States District Court for the Central District of California exercised subject matter jurisdiction pursuant to 42 U.S.C.

§2000, et seq., and 42 U.S.C. §1981, and had jurisdiction over the state claim under the doctrine of pendente jurisdiction. United Mine Workers v. Gibbs, 388 U.S. 715, 725 - 726 (1966).

The order of dismissal appealed from is, by its inherent nature, final. Consequently, the Ninth Circuit Court of Appeals had jurisdiction to hear this appeal pursuant to 28 U.S.C. §12191.

B. COURSE OF PROCEEDINGS

February 24, 1986: Yee filed a lawsuit in the U.S. District Court Central District of California, Case No. CV86-1182 MRP, against Hughes alleging racial discrimination with respect to Yee's discharge.

March 8, 1989: The district court found that the head of Hughes' Human Resources Department knowingly falsified Yee's performance ratings (**ER 3**, pp.6-7). These falsified performance ratings were then reported to the head of Hughes which were used to justify his termination (**ER 3**. pp.6-7).

April 7, 1989: The district court found that "Yee's discharge was wrongful, intentional, racially motivated and in violation of his rights under the laws of the United States and the State of California"

(**ER 11**, p.2). The district court enjoined Hughes from engaging in any further efforts to discharge Yee other than for just cause (**ER 11**, p.2 and **ER 12**, ¶19).

May 1, 1989: Pursuant to court order, Yee was reinstated by Hughes.

March 14, 1990: Yee followed Hughes' internal Grievance Procedure re: 1989 appraisal.

March 8, 1991: Yee followed Hughes' internal Grievance Procedure re: 1990 appraisal and failure to promote:

March 9, 1992: Hughes terminates Yee's Grievance Procedures and disciplines Yee.

April 3, 1992: Yee followed Hughes internal Grievance Procedure re: 1991 appraisal.

August 31, 1992: Yee filed an EEOC complaint against Hughes asserting racial discrimination regarding unsubstantiated performance evaluations and denial of promotions -- 1989, 1990, 1991.

September 14, 1992: Hughes issued Yee an "At Risk" Layoff Notification.

November 17, 1992: Yee was wrongfully discharged by

Hughes.

November 20, 1992: The EEOC issued the Notice of Right to Sue statements regarding the August 31, 1992 complaint.

January 23, 1993: Yee filed a second EEOC complaint alleging wrongful termination and denial of promotions.

February 9, 1993: The EEOC issued the Notice of Right to Sue statements regarding the January 23, 1993 complaint.

February 22, 1993: Yee filed the subject complaint in the district court. Appeal is sought on the second and third claims (brought under 42 U.S.C. §2000 et seq. and 42 U.S.C. §1981, respectively, asserting wrongful discharge), the fifth claim brought for breach of the employment agreement and the claim for injunctive relief.

March 7, 1994: The district court granted summary judgment on the first claim and partial summary judgment on the second, third and fourth claims. The district court stated that the statute of limitations precluded basing the second, third and fourth claims upon allegations of discrimination with respect to the 1989 and 1990 performance appraisals and 1990 denial of promotions.

January 6, 1995: The district court granted summary

judgment on the second, third, fourth and fifth claims and the unnumbered claim for injunctive relief.

January 9, 1995: Yee, appearing pro se, filed notice of this appeal.

July 22, 1996: The Ninth Circuit affirmed the district court's ruling regarding the motion for summary judgment. The court declined to consider the continuing violation theory.

STATEMENT OF THE FACTS

A. BACKGROUND

Yee is a highly-educated Asian male of Korean/Chinese national origin. Yee attended Cornell University in Ithaca, New York, and received his Bachelor of Science degree, magna cum laude, in 1976 and his Masters in Business Administration, with distinction, in 1980. Yee's undergraduate degree was in civil engineering, and his M.B.A. emphasized international finance and accounting.

B. EMPLOYMENT HISTORY WITH HUGHES

On October 19, 1982, Yee began working for Hughes as a

Program Control Administrator (**ER 1, ¶3**). Although Yee was performing his work satisfactorily, he was fired. On February 24, 1986, Yee filed a lawsuit in the district court against Hughes alleging racial discrimination with respect to Yee's discharge.

1. **U.S. District Court Ordered Reinstatement**

On March 8, 1989, the district court found that the head of Hughes' Human Resources Department knowingly falsified Yee's performance ratings (**ER 3**, pp.6-7). These falsified performance ratings were then reported to the head of Hughes which were used to justify his termination (**ER 3**, pp.6-7). As a result, the district court found that "Yee's discharge was wrongful, intentional, racially motivated and in violation of his rights under the laws of the United States and the State of California" (**ER 11**, p.2).

On April 7, 1989, the district court enjoined Hughes from engaging in any further efforts to discharge Yee other than for just cause and from discriminating against Yee and ordered Yee's reinstatement.[1] (**ER 11**, p.2 and **ER 12**, ¶19.)

On May 1, 1989, pursuant to that court order and after a

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[1] Yee was reinstated without back pay because he earned a higher salary while away from Hughes, and sought only reinstatement.

three-year absence from Hughes, Yee was reinstated. Yee was assigned to the Space Vehicles Division of Hughes' Space Communications Group as a Program Control Administrator, Senior, at an annual salary of $33,000 (ER 11, p.1, **ER 13**, ¶2, and **ER 14**, p.3).

(a) First Grievance Regarding 1989 Performance Appraisal

When Yee was reinstated, Yee was assigned to the exact supervisor, Ron Brown, who testified against Yee at the discrimination trial.[2] From the start, Ron Brown refused to assign Yee meaningful work and treated him with hostility (**ER 13**, ¶3). However, Yee refused to remain idle and began working for Gerry Bretting, a Project Manager in the Government Spacecraft Product Line (**ER 13**, ¶3 and **ER 18**, ¶2).

Under Bretting's supervision, Yee developed an application of the Micro-Frame Project Manager ("MPM"), a computer program

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[2] Yee's supervisor, Ronald Brown, was a 20+ year Hughes employee without benefit of a college education. Yee was the only Asian and only Ivy League educated member of Brown's direct reports. Yee was also Brown's only report with an MBA. Brown is a large white man over 6 feet tall and Yee, at 5 feet 4 inches, is a diminutive Asian who speaks English with a thick accent. The only testimony about this placement of Yee in Brown's group was that it was an attempt by Hughes to pigeonhole Yee and to prevent him from advancing within the Hughes organization. (**ER 13**, ¶3, **ER 16**, p.3, ll.10-18).

designed to track departmental earnings and compare them to work schedules and goals (**ER 18**, ¶2). Yee worked an average of 60 to 70 hours per week and attended every group meeting unless he received prior approval not to attend due to higher priority work (**ER 13**, ¶¶4-5). Yee's outside project ultimately earned an award (**ER 25**) and once implemented by Hughes threatened the need for Brown's department (**ER 28**).

In March 1990, Ron Brown evaluated Yee's performance for the period from his reinstatement to December 1989 and gave him an overall assessment of "Meets Hughes Standards" (**ER 18**, ¶4). Brown could not find an objective criticism of Yee's work, because Yee's technical knowledge and business insights were exceptional (**ER 13**, ¶8). Instead, Brown downgraded Yee based on subjective findings such as "team player" and "interpersonal relations" (**ER 13**, ¶8, **ER 18**, ¶6, and **ER 19**, p.2). Was this evaluation due to Yee's work outside of Brown's group and his failure to sit quietly at his desk without an assignment from Brown?

In the narrative portion of the evaluation, Brown commented specifically on Yee's poor attitude, his tendency to be argumentative, his need for improved communication skills and the importance of

his learning to be more of a "team player" (**ER 18**, ¶5 and **ER 19**, p.9).

Yee disputed Brown's subjective findings (**ER 13**, ¶8 and **ER 19**, p.4). However, Brown could not specifically identify when Yee was not a team player (**ER 13**, ¶8). In fact, Yee's ability to communicate and work well with others is confirmed by Hughes' employees, Derek Greene and Lea-Anne Matsuoka, who worked with Yee in a team-like environment on the project outside of Brown's supervision (**ER 20**, ¶¶9-10 and **ER 21**, ¶4).

As a result of the unsubstantiated performance appraisal, Yee refused to sign the appraisal's acknowledgment and followed Hughes' Employee Grievance Procedure[3] and initiated a complaint with Larry

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[3] **Hughes' Employee Grievance Procedures**

During the entire course of YEE's employment with Hughes, Hughes maintained an Employee Problem Resolution Procedure ("EPRP") which was purportedly designed to deal with employee-supervisor conflicts (**ER 1**, ¶9). The EPRP states that "[e]mployees who believe that they have been treated unfairly in the application of a Company policy and practice may request and receive a timely investigation and reasonable disposition of the claim without fear of restraint, interference, coercion, discrimination or reprisal" (**ER 15**, p.3).

In addition, Hughes maintained a Human Resources Department which was designed to handle employee grievances

Spicer, Division Manager (**ER 18**, ¶6). Although the performance evaluation was revised, the overall assessment of "Meets Hughes Standards"[4] remained unchanged (**ER 18**, ¶7 and **ER 19**, p.4). As a result, Yee again refused to sign the appraisal's acknowledgment (Appendix, **ER 18**, ¶7 and **ER 19**, p.4).

(b) Second Grievance Regarding Denial Of Promotion

On or about April 1, 1990, Yee had been nominated for a Hughes Achievement Award (**ER 25**), and was offered a promotion to Manager of Program Management by Frank Taormina (**ER 1**, ¶12). Lea-Anne Matsuoka, Yee's team mate, confirms in her

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fairly and to develop employment policies which comport with the laws of the
United States and the State of California (**ER 1**, ¶9). However, these policies were a mere facade and provided employees with no real remedy. For example, Sue Hungate, a representative from the Human Resources Department did not provide written responses to any of Yee's 1990 grievances (**ER 16**, p.6). In fact, it is a known fact among employees that if you go to Hughes' Human Resources with a complaint, you are blacklisted for being a difficult person (**ER 16**, p.5).

[4] Far Exceeds Requirements and Consistently Exceeds Requirements are higher, Assessments that are usually given to satisfactory employees. An evaluation of "Meets Hughes' Standards" is synonymous with the black list. (See Evaluations **ER 32**).

declaration Yee's offer of a promotion and states that it was her understanding that she and Yee would be promoted to Taormina's department together (**ER 21**, ¶5). However, Lea-Anne Matsuoka stated that shortly after Taormina met with Human Resources, his attitude changed with respect to Yee and that Taormina (Italian-American) appeared to cave into political pressures against Yee (**ER 21**, ¶7 and **ER 22**, p.17). Although Yee was her team leader (**ER 20**, ¶6, **ER 21**, ¶4, **ER 25** and **ER 28**), Lea-Anne Matsuoka was promoted to Taormina's department and Yee was not (**ER 21**, ¶8).

As a result of the denial of promotion, Yee again followed Hughes' Employee Problem Resolution Procedure (EPRP) (**ER 17**, p.2). Yee continued to meet with Hughes' Human Resources personnel and management regarding the denial of promotion (**ER 13**, ¶¶18-23).

© **Third Grievance Regarding 1990 Performance Appraisal**

On March 8, 1991, Yee received his performance appraisal for 1990 with an overall assessment of "Meets Hughes Standards" (**ER 23**, ¶2 and **ER 24**, p.4). Yee's substantive performance was highly rated, whereas he needed to improve his "team and people skill[s]" (Appendix, **ER 23**, ¶2 and **ER 24**, p.2). Again, Yee's

supervisor, Bilderback, could not find an objective criticism of Yee's work, and instead, Bilderback downgraded Yee based on subjective findings.

However, Yee disputed these subjective findings, as Yee was recognized in 1990 for his performance and team skills (**ER 25, ER 26**, and **ER 28**). Yee designed a system which was "a clear example of an operational breakthrough within Hughes [which could] potentially save a minimum of $16M during the next five years (**ER 25**). As a result, Yee received a Division Achievement Award which is only given to less than the top 0.01% of Hughes' employees each year (**ER 12**, ¶2 and **ER 13**. ¶6).

Also during 1990, K. R. Shuman performed a classification audit of Yee's job functions and concluded:

> Mr. Maximilian-Yee's current job responsibilities are to implement and maintain the Cost/Schedule Integrated Earned Value System (C/S IEVS) for Division 4K. This is a system developed by Mr. Maximilian-Yee which can potentially allow for more control over a Program's cost and schedule requirements. A major portion of his duties involves training and consulting employees involved in Program management to use the system. In performance of his duties, Mr. Maximilian Yee has a high degree of autonomy and requires little guidance and direction from supervision in managing the implementation of the C/S IEVS system.

...

> It has been determined that based on his duties and responsibilities, a more appropriate classification would be within the Management Systems job family. Based on his amount of autonomy in managing the C/S IEVS system, it is recommended that he be promoted to the Management Systems Specialist (SG = 15) job classification. Interdepartmental Correspondence of May 8, 1990 **(ER 26)**.

Notably Yee's promotion and reclassification from a Program Controls Administrator, Senior (SG = 13) to a Management Systems Specialist (SG = 15) came from outside of his own group which was admittedly rare (**ER 26**, p.1 and **ER 27**, pp.3-4).

In addition, during 1990, Yee was praised in Hughes' newspaper for his team effort in revolutionizing the way SCG plans contract schedules and costs. "New System Improves Project Performance Measurement" (**ER 28**). During 1990, Yee was acknowledged for his perseverance, dedication and vision to successfully complete the cost/schedule integration project (**ER 25**). He was recognized for overcoming great skepticism and adversity from many of the front line managers (**ER 25**). Finally, Yee was cited for having a high degree of autonomy and requiring little guidance and direction from supervisors in managing the

implementation of the C/S IEVS system (**ER 26**, p.1).

All of the above are evidence an individual who works well with others and Yee's ability to communicate and work well with others is confirmed by the declaration of Hughes' employees, Derek Greene and Lea-Anne Matsuoka, who worked with Yee in a team-like environment (**ER 20**, ¶¶9-10 and **ER 21**, ¶¶4,10). The only black mark against Yee was Yee's race and his use of Hughes' Grievance Procedure.

Understandably, and pursuant to Hughes Grievance Policy, Yee complained about the 1990 appraisal to Spicer, other members of Hughes management and to Ted Westerman, Senior Vice President for Human Resources and Administration (**ER 23**, ¶3). Despite Yee's complaints during 1991, his 1990 appraisal remained unchanged (**ER 23**, ¶3).

On January 8, 1992, Mr. Iorillo, President of Hughes, stated to Yee that "[y]ou'll never get anywhere within Hughes Aircraft Company." (**ER 12**, ¶15.)

(d) Hughes Terminates Yee's Grievances.

On March 9, 1992, Yee met with Larry Spicer, Division 4K Manager, Gary Osborn, Group Material director, Sue Hungate,

Director of Human Resources, and Mr. Westerman, Corporate Vice President of Human Resources regarding denial of his promotion. At the meeting, Westerman denied Yee's promotion. Yee's grievance was terminated by Hughes. Yee was disciplined for filing the grievance by being involuntarily transferred to Osborn's department, and Hughes had security escort Yee out of the building and Mr. Westerman told Yee never to return to Hughes' corporate building (**ER 13**, ¶25).

(e) **Fourth Grievance Regarding 1991 Performance Appraisal**

On April 3, 1992, Yee received his performance appraisal for 1991 with an overall assessment of "Does Not Meet Requirements" (**ER 29**, p.4). In the narrative portion of the appraisal, Bilderback stated that Yee needed to "improve his performance and effectiveness" and "learn some additional people, teaming, and communication skills" (**ER 29**, p.2). Again, Yee vehemently disputed Bilderback's findings and refused to sign the performance appraisal (**ER 29**, p.4). In actuality, wasn't Yee being told, once again, to stop using Hughes Internal Grievance Procedure -- after all his work was exceptional, but grievances created problems for his "team", and Hughes had just terminated Yee's use of the Grievance

procedure.

In support of Yee's contentions, Plaintiff offered the declaration of Derek Greene who believed that the employees remaining at Hughes after Yee's layoff did not possess comparable knowledge to Yee with respect to the cost/schedule integration of MPM/Artemis (**ER 20**, ¶11). Greene placed Yee's technical knowledge between above average to superior (**ER 20**, ¶10). Also, Matsuoka, in her declaration, believed that 90% of the business community at Hughes after Yee's layoff are less skilled, less educated and had less knowledge in the cost and schedule integration process than Yee (**ER 21**, ¶10). Both Greene and Matsuoka speak well of Yee's team attitude and communication skills (**ER 20**, ¶¶9-10 and **ER 21**, ¶4).

Since Yee's 1989 reinstatement, Yee was been continually recognized outside of his group for his performance and team skills, yet his performance appraisals have always failed to reflect his performance and team skills.

2. **Discrimination Charge Filed With The EEOC**

On August 31, 1992, Yee filed an EEOC complaint asserting racial discrimination regarding unsubstantiated performance

evaluations and denial of promotions (**ER 30**).

3. **November 1992 Layoff And Retaliation**

Fourteen (14) days after Yee filed an EEOC discrimination complaint and three (3) months after Hughes' internal Grievance Procedures were terminated by Hughes with the forced transfer of Yee, with Hughes' security escorting Yee from his office and with Hughes' instruction to Yee never to return to Hughes' corporate building, Yee received an "At-Risk" Layoff Notification (**ER 12**, ¶¶16,17, **ER 13**, ¶¶24-25).

However, Hughes' retaliation against Yee did not stop there. Yee was slated for layoff on November 19, 1992, but Yee was terminated two days early because an article in the Los Angeles Times entitled "Aerospace Career in Low Orbit" regarding Yee's discrimination in particular and Hughes' discrimination against Asians in general was published on November 16, 1993. (**ER 12**, ¶18).

Hughes contends that the only factors considered in Yee's selection for layoff was Yee's performance record as compared to that of other employees who where performing comparable jobs and a recent disciplinary warning for insubordination (**ER 31**, pp.2-3).

But Hughes' "non-discriminatory" reason was a pretext.

First, Yee's performance appraisals are not objective and are unsubstantiated: Yee continually objected to the discriminatory elements in his performance appraisals and asserted his rights through Hughes' internal Grievance Procedures (**ER 12**, ¶¶11,15,16; **ER 13**, ¶¶18-25; **ER 18**, ¶¶6,7; **ER 19**, ¶¶24,29). The employees com-pared to Yee in selecting Yee for lay-off did not object to any of their performance appraisals (**ER 32**, pp.8, 12, 16, 22, 26, 30); and according to Larry Spicer, Hughes' division manager, Yee should not be compared to other Management System Specialists listed in the SCG Layoff Analysis in making a layoff decision (**ER 21**, pp.5-6).

Second, Hughes' unlawful motivation and pretext for the layoff is supported by facts: Taormina's attitude changed with respect to Yee after meeting with Human Resources (**ER 21**); Bertoneau told Yee that he has difficulty in hiring Asians for Asian marketing positions because he felt that Asians would have a "divided loyalty" and could not be trusted in these difficult positions (**ER 22**, ¶14); the President of Hughes, Mr. Iorillo stated to Yee that "[y]ou'll never get anywhere within Hughes Aircraft Company" (**ER 12**, ¶15); at the culmination of Yee's use of Hughes' internal

Grievance Procedures, Yee was denied a promotion, involuntarily transferred to another department, escorted out of Hughes' headquarters by security and told never to return (**ER 12**, ¶15); and Yee was laid off two days early due to an article printed in the Los Angeles Times Hughes' discrimination against employees based on race (**ER 12**).

Yee filed his second EEOC complaint on January 23, 1993 alleging wrongful termination and on February 9, 1993, EEOC issued Yee a right to sue letter.

ARGUMENT

I. COURTS OF APPEAL HAVE THE AUTHORITY TO ENTERTAIN NEW LEGAL THEORIES ON APPEAL, EVEN THOUGH THE LEGAL THEORY WAS NOT PRESENTED TO THE COURT OF FIRST INSTANCE.

Generally, appellate courts will not review issues or theories not presented to the courts below. Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990), Lone Star Steel Co. V. United Mine Workers of America, 851 F.2d 1239 (10th Cir. 1988), In re Goff, 812 F.2d 931 (5th Cir. 1987), Teumer v. General Motors Corp., 34 F.3d 542 (7th Cir. 1994). However, several of the circuits recognize the

authority of the appellate court to consider a new issue or theory raised for the first time on appeal, when the issue or theory involves a pure question of law. Delta-X Corporation v. Baker Hughes Production Tools, Inc., 984 F.2d 410 (Fed. Cir. 1993), Bannum Inc. v. The City of St. Charles, MO., 2 F.3d 267 (8th Cir. 1993), Atlantic Mutual Insurance Company v. Truck Insurance Exchange, 797 F.2d 1288 (5th Cir. 1986).

California has recognized this exception to the general rule. California courts of appeal will permit a party to an action to raise a new theory for the first time on appeal when all the pertinent facts to the legal issue were fully represented to the trial court. Fields v. Blue Shield of California, 209 Cal.Rptr. 781 (Cal.App. 4 Dist. 1985), Marsango v. Automobile Club of Southern California, 82 Cal.Rptr. 92 (Cal.App. 2 Dist. 1969), Panopulos v. Maderis, 47 Cal.2d 337 (1956). Mr Yee's case falls within the California and Circuit court exception to the general rule concerning new theories raised on appeal, therefore the Ninth Circuit incorrectly decided Mr. Yee's appeal.

A. The Ninth Circuit Court of Appeal had the authority to hear, consider, and rule on the legal

theory of continuing violation presented for the first time on appeal regarding the jurisdiction of the district court for the purposes of Mr. Vincent Yee's Title VII discrimination case.

The Ninth Circuit recognized the validity of the continuing violation theory (see Appendix Oral Argument Transcrpit) but felt it was unable to review the theory because it had not been briefed for the district court. Yee v. Hughes Aircraft, D.C. No. CV 93 - 00903 - MRP (1996). However, it did have the authority to hear, consider and rule on the issue presented to the court because appeals courts specifically decide issues of law and this theory is a legal theory. This is consistent with the other court's rulings.

As was mentioned above, the Federal, Eighth, and Fifth Circuits have recognized the legal theory exception to the general rule which prohibits the consideration of issues and theories raised for the first time on appeal, as well as the California courts of appeals have recognized the same exception to the general rule. This Court should announce a rule that recognizes the legal theory exception to the general rule so that there is consistency among the Circuit courts as well as the state courts regarding this matter. As of now, if Mr. Yee had brought his cause of action before the State Court of

California rather than the Federal court, he would have had the benefit of this exception.

B. The factual record from the district court supports the legal theory of continuing violation, therefore the Ninth Circuit incorrectly affirmed the district court's granting of summary judgment.

The Ninth Circuit recognized the applicability of the continuing violation theory during the oral arguments. Judge Merhige on the Ninth Circuit review panel commented he believed the continuing violation theory was applicable to Mr. Yee's case when he read the material provided to him for purposes of the appeal. He stated; "That thought [continuing violation] occurred to me as I read the briefs...". See Appendix Oral Argument Transcript, p. 7. If the judge recognized the validity of the theory based on the material presented to him on appeal, the factual record created in the district court, then all the relevant pertinent facts were fully developed in the record below and the court incorrectly applied the general rule regarding new theories raised on appeal. Additionally, the opposing attorneys' only compliant was that the argument was not raised in the opposition brief to the motion for summary judgment submitted by

Mr. Yee, not that the facts did not support the theory. However, the court in its opinion stated; "Because the absence of a continuing violation assertion resulted in a record which was not proerly developed in the district court we decline to consider the issue." Hughes Aircraft Company, D.C. No. CV 93 - 00903 -MRP (1996). The court's opinion and the court's oral argument discussion are contradictory. The court should have applied the exception to the general rule because the factual record supported the legal theory presented at the appellate level and the court, in this case, recognized the theory during the oral argument presented on the facts provided to them.

II. WHEN REVIEWING A MOTION FOR SUMMARY JUDGMENT RULING, THE COURTS OF APPEAL EMPLOY THE DE NOVO STANDARD OF REVIEW AND SHOULD AFFIRM OR DISAFFIRM ON THEORIES SUPPORTED BY THE ESTABLISHED FACTUAL RECORD WHETHER OR NOT THE THEORIES WERE CONSIDERED BY THE DISTRICT COURT.

Motions for summary judgment on appeal are reviewed de novo. Lindahl v. Air France, 930 F.2d 1434 (9th Cir. 1991). An appellate court reviews and decides if "there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law". FRCP 56 (c). The record reviewed is the factual record established in the lower court.

This Court addressed the issue of appellate review and the summary judgment record in several cases. In U.S. v Diebold, Inc., 369 U.S. 654 (1962) this Court stated; "on summary judgment the inferences to be drawn from the underlying facts contained in such materials [affidavits, depositions, and exhibits] must be viewed in the light most favorable to the party opposing the motion". The Court has also stated; "we look at the record on summary judgment in the light most favorable to the party opposing the motion". Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962). In other words, the reviewing court is to read the record in the light most favorable to the party who defended against the motion. Angel v. Seattle-First National Bank, 653 F.2d 1293 (9th Cir. 1981), Ring v. Schlesinger, 502 F.2d 479 (C.A. 1974), Rogen v. Ilikon Corp., 361 F.2d 260 (1st Cir. 1966), Bailey v. Hartford Fire Ins. Co., 565 F.2d 826 (2nd Cir. 1977), Kaufman v. Soloman 524 F.2d 501(3d Cir. 1975), Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981), Aetna Ins.

Co. v. Loveland Gas & Elec. Co., 369 F.2d 648 (6th Cir. 1966), U.S. v. Bob Chrislaw, Inc., 341 F.2d 887 (7th Cir. 1965), Diebold v. Civil Serv. Comm'n of St. Louis County, 611 F.2d 697 (8th Cir. 1979), Lindley v. Amoco Production Co., 639 F.2d 671 (10th Cir. 1981). Therefore, an appellate court must also consider legal theories supported by the factual record, but not heard by the lower court, to truly read the record in the light most favorable to the party who defended against the motion and to provide an honest de novo review.

A. The appellate court is not applying a de novo standard of review if the court will affirm but not disaffirm a decision based upon a theory not relied upon by the lower court; the appellate court must both disaffirm and affirm a decision for a true de novo review to occur.

Despite the fact the appellate court is to view the record in the light most favorable to the party opposing the motion, an appellate court will affirm the district court's granting of summary judgment on a theory not considered by the district court if the outcome was correct. The Fifth Circuit will uphold a motion for summary judgment even though the district court applied the

incorrect legal standard if it is apparent on appeal that no genuine issue of fact existed under the proper legal analysis. Church of Scientology of California v. Cazares, 638 F.2d 1272 (5th Cir. 1981). The Ninth Circuit held that it is "proper for this court to affirm summary judgment on any ground that appears from the record, whether or not the trial court relied on it". Helena Rubenstein, Inc. v. Bau, 433 F.2d 1021, 1023 (9th Cir. 1970). However, a court will not reverse a motion for summary judgment on a different theory than the legal theories presented to the district court even if the record will support the newly raised theory. This is counter intuitive to a truly independent or de novo review and to the notion of viewing the established record in the light most favorable to the party opposing the motion.

B. Appellate courts are in a position that promotes decisional accuracy and a more comprehensive analysis of the legal issues involved in a case, therefore the courts are in a position to affirm or disaffirm on legal theories not presented to the court of first instance.

This Court declared the virtues of an independent appellate review in the Court's opinion rendered in the Salve Regina College v.

Russell, 499 U.S. 225 (1991), with respect to the appellate court's de novo review of district court's state-law determinations.

> The general rule of independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. Courts of appeals are structurally suited to the collaborative juridical process that promotes decisional accuracy. They are able to devote their primary attention to legal issues. They have the advantage of refined briefs which bring to bear on the legal issues more information and more comprehensive analysis than was provided to the district judge. And they employ multi judge panels that permit reflective dialogue and collective judgment. Id., at 225.

This rationale and reasoning is also applicable to the de novo review granted by appellate courts to review summary judgments. If the appellate court is in a position that "promotes decisional accuracy" and allows for a "more comprehensive analysis" then this position should also be used to promote justice.

Courts of appeal will affirm a summary judgment on a different theory if the correct decision was ultimately made, however, appeals courts have not afforded the same benefit to the appellant in an appeal of a granting of a summary judgment. It is logical and rational that a court which has the ability to provide a dispute before it a comprehensive analysis due to the refined briefs presented to the

court on the specific issue should be permitted to reverse a decision as well as affirm one if the district court failed to recognize and consider a legal theory supported by the facts of the case, especially when the appellant has raised the new legal theory on appeal.

In the case before the Court this is precisely what has occurred. The district court granted Hughes' motion for summary judgment. Yee v. Hughes Aircraft Company, CV 93 -903 MRP (1995). Mr. Yee appealed the ruling and raised a new legal theory, supported by and in conformance with the record below, to support the court's jurisdiction over the events which occurred beyond the 180 day statute of limitations dictated by Title VII. The Ninth Circuit Court judges, themselves, recognized the validity of the argument put forth by Mr. Yee. See Appendix Oral Argument Transcript. Ultimately, they declined to reverse the ruling of the district court because Mr. Yee had failed to raise the continuing violation theory of jurisdiction in their opposition papers filed with the lower court. Hughes Aircraft Company, CV 93 -903 MRP.

However, the appellate level review is precisely the arena where this injustice should be and must be corrected. The court recognized the validity of Mr. Yee's continuing violation argument

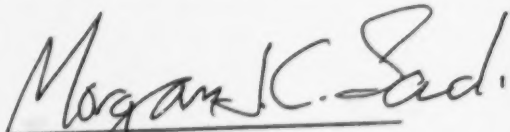
due to the court's own reading of the factual findings of the district court. See Appendix, Oral Argument Transcrpit, p. 7. If the court was able to see the argument in the facts presented to it, then the legal argument certainly was not obscure or lacking in support. Only injustice is served when the appellate courts are not permitted to disaffirm as well as affirm a motion for summary judgment based upon an alternate legal theory.

CONCLUSION

For the foregoing reasons, we respectfully request the Supreme Court of the United States to grant certiorari on the issues discussed in this petition for writ of certiorari.

DATED: October, 18 1996

HUTH, LYNETT & SCUDI

By: 

Morgan J.C. Scudi
Counsel of Record for the
Petitioner

APPENDIX

A

DOCUMENT 1

PERTINENT PARTS OF TITLE VII

Unlawful Employment Practices
42 U.S.C. §2000e - 2

(a) Employer Practices
It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities to otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Time for filing charges
42 U.S.C. §2000e - 5(e)(1)

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof,

such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with State or local agency.

Appeals
42 U.S.C. §2000e - 5(j)

(j) Any civil action brought under this section and any proceedings brought under subsection (I) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

DOCUMENT 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VINCENT MAXIMILIAN YEE, Plaintiff, v. HUGHES AIRCRAFT COMPANY, et al., D0efendants.	) CASE NO. CV 93-903 MRP) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Court having considered the evidence presented, the points and authorities submitted by the parties, the argument of counsel, and the entire record in this case,

IT IS HEREBY ORDERED that, based on the Statement of Uncontroverted Facts and Conclusions of Law that have been filed concurrently herewith, defendants' motion for summary judgment on plaintiff's second, third, fourth, and fifth claims and the unnumbered claim for injunctive relief is granted and that judgment be entered in favor of defendants and against plaintiff.

DATED:

Mariana R. Pfaelzer
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VINCENT MAXIMILIAN YEE, Plaintiff, v. HUGHES AIRCRAFT COMPANY, et al., Defendants.	) CASE NO. CV 93-903 MRP) STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

UNCONTROVERTED FACTS

1. Yee's substantive allegations may be placed into three categories: (a) those relating to alleged discrimination in 1990 and 1991 (1989 and 1990 performance evaluations an dvarious promotions); (b) those relating to denials of promotion in connection with a reorganization in mid-1992; and (c) those relating to the November 1992 layoff.

2. On March 7, 1994, this Court granted Defendants' motion for summary judgment on the portions of Yee's complaint alleging discrimination in his 1989 and 1990 performance evaluations and in a 1990 denial of promotion to the Communications Electronics Division.

1990 Promotion Decisions

3. Although Yee makes no such express allegations in his complaint, his deposition testimony suggests that he seeks to base his claims on allegedly discriminatory denials of promotions in 1990. Yee has no facts to support this claim.

4. Hughes records indicate that Yee applied for the following positions in 1990: (a) Manager, Program Business Management; (b) Corporate Program & Contract Specialist; (c) Manger, Project; (d) Manager, Program Controls; and (e) Management Systems Specialist.

a. Manager, Program Business Management.

This management position in Santa Barbara, California, was filled internally by Rudy Gruber, an employee who had worked for more than ten years at Hughes (in contrast to Yee's five years) and who had more than eight years of prior program controls experience. Yee had no management experience and was considered less qualified that Mr. Gruber.

b. Corporate Program & Contract Specialist.

Hughes selected Rodney Machado to assume this position. Mr. Machado had eight years of experience in program administration and contract negotiations, which were essential for this position. He had

been an administrator for contracts worth over $700 million. Yee had no such experience.

c. Manager, Project. Sanford Gordon, who Hughes selected for this position in Tucson, Arizona, was a program manager who had been working closely with a Hughes customer in Tucson for over eight years, and had been with Hughes since 1968. The position required continuing close contact with the Hughes customer in Tucson, which made continuity a critical consideration. Yee had no experience with the customer.

d. Manager, Program Controls. This position required special program access and a "Top Secret" clearance; Yee had only a "Secret" clearance. The successful candidate, William Michel, had all necessary accesses and 10 years of experience.

e. Management Systems Specialist. This position also required Top Secret clearance or an Extended Background Investigation ("EBI"). A number of applicants, including Yee, were rejected because they lacked this credential. Diane Kirchner, who was a business manager with previous program experience in the hiring organization, was the successful applicant.

Mid-1992 Promotion Decisions

5. In June 1992, HSC announced a restructuring designed

to enhance its ability to operate efficiently in an increasingly competitive global marketplace. During this restructuring, nine operating divisions, consisting of 52 product lines, were realigned into approximately 25 business units.

6. As a part of the reorganization, HSC held an open selection process to name the leaders of the new business units. Employees at levels 0 through 3 -- "0" being the highest -- were invited to apply for those positions. Employees below that level also were permitted to apply, with the understanding that "exceptionally strong qualifications" were required.

7. Yee was classified at level 6, with 7 being the lowest level. The job description for BusinessUnit Leader required, among other qualifications, 15 years of related experience, including at least five years in management.

8. The selection process was managed by Jennifer Smolker, HSC Vice President. She was assisted by a team that included etnically-diverse representatives of various organizations within HSC.

9. According to Company records, Yee submitted applications ofr two Business Unit Leader positions: (a) one in Information Systems; and (b) one in Finance/Business.

a. Information Systems. Twenty-seven

individuals applied for the Information Systems leadership position. Most had advanced degrees and at least 25 years of experience. Almost all had high-level managerial experience. Three applicants (11%), including Yee, were Asian-American. Of the remaining applicants, 20 were Caucasian and 4 were black. Gary Osborn (Caucasian) wa appointed Business Leader for the Information Systems Business Unit (later renamed Information Technology). He has worked at Hughes since 1959 and has more than 20 years of experience in management. After holding a variety of responsibilities in the manufacturing areas of HSC, Osborn was appointed Director of Material and Information Systems in 1991. Prior to that appointment, Osborn had spent a full year studying and designing an integrated computer systems architecture for HSC.

b. Finance/Business. Sixteen persons appled fo the Finance/Business leadership position. All applicants except Yee held management positions at the time of the selection process. Most had more than 20 years of experience, as well as advanced degrees. Two of the applicants (12.5%), including Yee, were Asian-Americans. The other applicants included one Hispanic, one black, and 12 Caucasians. Edward Fitzpatrick (Caucasian) was appointed Business Unit Leader for the Finance/Business organization. Fitzpatrick, who

earned an MBA from Rutgers University, has worked in managerial positions at Hughes for more than 12 years. He has had a wide range of responsibilites in the areas of systems managment, business operations, and program management.

10. Although Yee held an advanced degree in business, he had far less experience and fewer skills than the other applicants for both of the Business Unit Leader positions for which he applied. Yee had *never* held a managerial position.

11. Of the 27 Business Unit Leaders ultimately selected, five (18.5%) were Asian-American. Yee has not shown racial bias against Asian-Americans as a group in the selection process for promotions during the mid-1992 reorganization.

12. Following the announcement of the Business Unit Leaders, HSC selected the next level of management, called Operations Leaders. A letter was sent to all exempt HSC employees inviting them to apply for the positions. Yee submitted applications to four Business Units, seeking unspecified Operations Leader positions: (a) Electronic Parts; (b) Commercial Systems Engineering and Operations/Government Systems Engineering and Operations; (c) Bus Electronics; and (d) DPP/MDR.

a. Electronic Parts. Ninety-seven applications

were submitted for the nine Operations Leader positions in the Electronic Parts Business Unit. Only 22 survived the first cut, and Yee was not among them. He did not specify which of the nine positions he sought, so he was treated as having applied for all of them. The nine successful applicants all had prior managment experience at Hughes; Yee had none. Those selected ranged in background from a Ph.D. with five years of experience to three individuals with over 30 years of experience. Of the nine, one was Asian, two were black and two were Hispanic. Two of the persons on the selection team were Asian.

b. Commercial Systems Engineering and Operations/Government Systems Engineering and Operations. The Commercial Systems Engineering and Operations and Government Systems Engineering and Operations Business Units held a joint selection process for Operations Leaders. Of the 140 applications received, 100 (including Yee's) were immediately rejected because the applicants did not have the requisite qualifications. Thirteen individuals were ultimately selected, of whom two (15.3%) were Asian-Americans.

c. Bus Electronics. The Business Unit Leader for Bus Electronics, Dave Nakatani, is Asian. He eliminated Yee because his background did not meet the requirements of the organization. Of the 10 individuals ultimately selected as Operations Leaders, two have

Ph.D.s, six have Masters Degrees, and two have Bacherlor of Science Degrees, all in either mechanical or electrical engineering. Yee's educational background is in civil structures and architecture, and he had only two years of technical experience at the time. One (10%) of the successful applicants is Asian.

d. DPP/MDR. Yee submitted the same application for this secret, classified program as he did for the other Operations Leader positions. He listed no references where the application called for 12. This application was late and was, therefore, not considered. HSC received 86 appliations for 6 advertised positions. Of those, the Company considered only 53. Seven (8%) of the 86 applications submitted were from Asian applicants. The selection team consisted of 8 individuals, of whom 3 were Asian.

1992 Layoff Decision

13. In 1992, in response to adverse economic conditions, Hughes implemented a restructuring of HSC that resulted in a workforce reduction of approximately 15%. Each Business Unit reviewed its needs and identified layoff candidates; approximately 1,000 employees received initial notification that they were subject to layoff.

14. Pursuant to Company policy, the Human Resources Business Unit then reviewed each proposed layoff. Under Company

Practice 3-042, the factors to be applied when reviewing layoff candidates are performance, skills, and the projected needs of the organization. Where these criteria were relatively equal, the employees with the longest Company service were retained.

15. For each employee identified for layoff, the employee's supervisor submitted the personnel folder and a Reduction in Workforce checklist. This document included, among other information, the names of employees whose work assignment was comparable to that of the layoff candidate. It also listed each employee's gender, age, ethnicity, and three most recent performance appraisal ratings.

16. In reviewing layoff decisions, Human Resources also utilized a computer-generated listing of employees by organization and job title, with demographic data and their performance appraisal ratings for the past five years.

17. In evaluating performance under Company Practice 3-0-42, Human Resources reviewed the performance ratings of the layoff candidates and the comparable employees. Yeels most recent rating prior to his layoff was "Does Not Meet Requirements," which is the lowest possible rating on a five-point scale. In addition, Yee's personnel folder contained a recent disciplinary warning for insubordinate conduct, which he had never challenged or made part of any EEOC charge.

None of the employees to whom Yee was compared for the purposes. of the layoff had the same low rating, nor the next-lowest rating of "Meets Most Requirements.'" One had the average rating of "Meets Hughes Standards" and the other five had above-average ratings.

18. At the time that layoff notices were distributed in the fall of 1992 1072 (15.1%) of HSC'S workforce of 7,105 were Asian. By November 28, 1992, when the layoff process was virtually complete, a total of 820 employees had been approved for layoff. Of those, only 108 (13.2%) were Asian. This left a total workforce of 6033 employees, of which 964 (16%) were Asian. Thus, after the layoff, the proportional representation of Asians in HSC'S workforce increased from 15.1% to 16%.

19. To the extent that any Conclusion of Law is deemed an Uncontroverted Fact, it is incorporated herein by reference.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. 5 1331.

2. Venue is proper in this district pursuant to 28 U.S.C. 5 1391(b) (1) and (2) because (1) all Defendants reside in this district and (2) the events or omissions giving rise to the alleged claims occurred in this district.

3. Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See California Architectural Bldg. Prods., Inc. v. San Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir.) , cert. denied 484 U.S. 1006 (1988) (the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts") (quoting Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). In order to defeat Defendants' motion, therefore, Yee was required to come forward with evidence--not merely speculation or conclusory assertions--that Hughes discriminated against him. He did not do so.

Title VII claim

4. In opposing a summary judgment motion, a Title VII plaintiff asserting disparate treatment must establish a *prima facie* case of discrimination and, if the employer articulates a legitimate, non-discriminatory reason for the challenged action, must raise a genuine factual issue as to whether the articulated reason was pretextual. Wallis v. J.R. Simplot Co., 94 Daily Journal D.A.R. 7049, 7051 (May 26,

1994) Sischo-Nownelad v. Merced Community College Dist. , 934 F.2d 1104, 1109-10 & n.7 (9th Cir. 1991) (citing McDonnell-DoucTlas v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)). Yee must produce "specific facts showing that there remains a genuine factual issue for trial" and evidence "significantly probative' as to any material fact claimed to be disputed." Steckl v. Motorola, Inc., 703 F-2d 392 (1983) (citations omitted7 emphasis in original).

5. When the challenged employment action is a reduction in force, the plaintiff must demonstrate that (1) he belongs to a protected class; (2) he was discharged from a job for which he was qualified; and (3) others not in his protected class were treated more favorably. Washington v. Garrett, 10 F.3d 1421, 1434 (9th Cir. 1993).

6. Yee's Title VII claim is based on his contention that he must have been discriminated against in connection with the layoff because he was discriminated against in connection with denials of promotion to several positions in 1990 (including the position in Communication Electronics that Yee alleges to have been promised in May 1990), and several top-level management positions for which he applied during the mid-1992 reorganization.

7. This Court has already ruled, however, that Yee may not base liability under Title VII on the May 1990 decision not to promote him to

a position in Communication Electronics, or on the 1989 or 1990 performance evaluations. This leaves only the denials of other promotions in 1990 and in mid-1992, and the November 1992 layoff as potential bases of Title VII liability.

1992 Layoff Decision

8. Hsc laid off over 800 employees in November 1992. The Human Resources Business Unit participated in the layoff decision-making, pursuant to Company policy. Yeets performance record was compared to that of other employees who were performing comparable jobs, and he was the only employee in that group to have a below average evaluation. That, together with a recent disciplinary warning for insubordination, resulted in his being selected for layoff. Yee has produced no evidence that any other factor was considered in his selection for layoff.

9. Yee has failed to show that his 1992 layoff was discriminatory. Yee speculates that he was singled out on the basis of his race. However, the proportional representation of AsianAmericans within HSC increased as a result of the layoff. Yeels mere assertions of discriminatory motive and intent are inadequate, without factual evidence, to raise an issue precluding summary judgment. See Steckl v. Motorola, Inc._, 703 F.2d at 393. *See also* Andre V. Bendix Corp., 841

F.2d 172, 176 (7th Cir.), cert. denied, 488 U.S. 855, 109 S. Ct. 144 (1988) ("[A] subjective belief of discrimination no matter how genuine, cannot be the sole basis for a finding of discrimination").

Mid-1992 Promotion Decisions

10. Yee may not base his Title VII claim on the denials of promotion in mid-1992. None of Yeels allegations with respect to the denials of promotion in mid-1992 has ever been the subject of an EEOC charge and a Title VII claim relating to those decisions is, therefore, untimely. 42 U.S.C. S 20OOe-5(e). See Lorance v. 14.T&T Technologies, Inc., 490 U.S. 900, 904, 109 S. Ct. 2261 (1989) (Title VII requires a plaintiff to file a charge of discrimination with the EEOC within 300 days of the alleged act of discrimination if he previously files a charge with the equivalent state or local agency, and 180 days if he does not); Ward v. Caulk, 650 F. 2d 1144, 1147 (9th Cir. 1981) (timely filing of an EEOC charge is a prerequisite to commencement of a civil action under Title VII).

11. Even if the Title VII claim were not time-barred with respect to these mid-1992 decisions, the undisputed facts establish that Hughes did not select Yee for any of those positions because the qualifications of those whom Hughes did select far exceeded Yee's.

1990 Promotion Decisions

12. For all of the reasons discussed in Defendants' previous summary judgment motion with respect to the alleged denial of promotion to the Communications Electronics Division in May 1990, Yee's Title VII claim with respect to the other denials of promotion in 1990 are time-barred as well. See 42 U.S. C. S 20OOe-5 (e) . *See also* Lorance v. AT&T Technologies, Inc., *supra,* 490 U.S- 900, 904, 109 S. Ct. 2261 (1989); Ward v. Caulk, *supx-a,* 650 F.2d 1144, 1147 (9th Cir. 1981).

13. Even if a claim as to those decisions were not time-barred, the undisputed facts demonstrate that, like the mid-1992 promotions, Hughes based the 1990 promotion decisions on Yee's relative qualifications and experience, and not on his race or national origin. Yee's theory of discrimination under Title VII is devoid of factual support, there is no triable issue as to this claim, and summary judgment is, therefore, appropriate.

Section 1981 Claim

14. Section 1981 protects the rights of all persons, regardless of race, "to make and enforce contracts." 42 U.S.C. S 1981, as amended. The *prima* facie case under Section 1981 is identical to the Title VII *prima facie* case. See Rodriauez v. General Motors Corn., 904 F.2d 531, 532 (9th Cir. 1990).

15. Yee's Section 1981 claim, like his Title VII claim, is based on his contention that he must have been discriminated against in connection with the 1992 layoff because he believes he was discriminated against in 1990 (promotions and performance evaluation), 1991 (performance evaluation), and mid-1992 (promotions). Defendants having articulated legitimate, non-discriminatory justifications for every conceivable decision on which Yee's claims might be based, Yee must come forward with substantial evidence that Defendants, proffered reasons are pretextual. Wallis v. J.R. Simclot Co., 94 Daily Journal D.A.R. at 7051. *See also* McDonnell-Doualas v. Green, 411 U.S. at 804, 93 S. Ct. 1817, 1825. He has not done so.

1992 Layoff Decision

16. For the same reasons that Yee cannot proceed with his Title VII claim, his Section 1981 claim relating to his layoff has no merit.

Mid-1992 Promotion Decisions

17. As forythe positions for which Yee applied during the 1992 reorganization, he has not established a factual basis for asserting a Section,1981 claim.

1990 Promotion Decisions

18. Yee's Section i981 claim is untimely with respect to the five 1990 promotional decisions. See Tavlor v. Reaents of the Univ. of Cal., 993

F.2d 710, 711-12 (9th Cir. 1993) (in California, Section 1981 claims are governed by the one-year statute of limitations for tort actions contained in California Code of Civil Procedure section 340(3)); McDouaal v. County of Imperial, 942 F.2d 668 (9th Cir. 1991) same).

19. Even if the claim were not time-barred, the undisputed facts establish that Hughes did not base its promotion decisions in 1990 on Yee's race or national origin.

20. Hughes is entitled to summary judgment on Yee's Section 1981 claim.

Section 1985 Claim

21. Section 1985 provides for an action for damages for violation of the rights it designates. See 42 U.S.C. S 1985(3).

22. In Great An. Federal S. & L. Ass'n v. Novotny, 442 U. S. 336, 99 S. Ct. 2345 (1979), the Supreme Court held that Section 1985 may not be invoked to redress alleged violations of Title VII. The plaintiff in Novotny alleged that his discharge from employment resulted from a conspiracy to deprive him of equal protection of and equal privileges and immunities under the laws. Id. at 369, 99 S. Ct. 2345, 2347. He claimed a violation of Title VII and sought damages under Section 1985 as well. The Court held that to permit a plaintiff to maintain such a claim would undermine the administrative construct that Congress

established in enacting Title VII and that "unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under 5 1985(3).. Id. at 378, 99 S. Ct. 2345, 2352. See Padway v. Palches, 665 F.2d 965 (9th Cir. 1982) ; Diem v. City & Ctv. of San Francisco, 686 F. Supp. 806 (N.D. Cal. 1988).

23. Yee's Section 1985 claim alleges that the six individual defendants conspired to deny him promotions and to lay him off. These are the same allegations that form the basis of his Title VII claim. Accordingly, Yee may not assert his fourth alleged claim for relief, and Defendants are entitled to summary judgment as a matter of law.

24. Even if Yee's Section 1985 claim were not precluded by Novotny, he has shown no facts to support his allegations that the individual defendants discriminated against him.

25. Defendants are entitled to summary judgment on Yee's section 1985 claim as well.

Wrongful Termination Claim

26. Yeels fifth claim asserts that he was denied promotions and laid off without just cause in breach of his implied-in-law employment contract and the implied covenant of good faith and fair dealing. This claim rests solely on the allegations of discrimination in the

promotion decisions and in connection with the layoff that form the basis of his discrimination claims.

27. The undisputed facts establish (1) that Yee was not selected for promotion to any of the top-level management positions for which he applied during the 1992 reorganization because his experience and qualifications did not match those who were ultimately selected; and (2) that Yee was selected for layoff as part of a bona fide reduction in force.

28. The covenant of good faith and fair dealing implies that each party will refrain from doing anything to injure the rights of the other to receive the benefits of the contract. See Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 618 (1979) . The nature and extent of the covenant in any particular case depends on the purpose of the contract at issue as well as the legitimate expectations of the parties. Id.; Love v. Fire ins. Exchanae, 221 Cal. App. 3d 1136, 114-1 (1990).

29. 'Good cause' means a 'fair and honest cause or reasonregulated by the good faith of the employer." Puah v. See's Candies, Inc. , 203 Cal. App. 3d 743, 769-770 (1988).

1992 Layoff Decision

30. A reduction in force motivated by adverse economic conditions

constitutes good cause to terminate employment as a matter of law. See, e.g., Gianaculas v. Trans world Airlines, Inc., 761 F.2d 1391 (9th Cir. 1985) ; Malmstrom v. Kaiser Aluminum, 187 Cal. App. 3d 299, 321 (1986). In late 1992, economic conditions in Southern California and in the defense industry nation-wide forced Hughes to restructure HSC and lay off 15% of its employees. company policy governed the layoff decision-making process, which was overseen by the Human Resources Business Unit. Yee's performance record was compared to those of employees who held comparable positions, and he was the only one in the comparison group whose most recent perf ormance evaluation was rated "Does Not Meet Hughes Standards," Hughes' lowest rating, and who had a written reprimand in his file. On that basis alone, he was selected for layoff.

Mid-1992 Promotion Decisions

31. The undisputed facts establish that Hughes selected candidates for promotion to the top-level management positions during the mid-1992 reorganization based on their relative qualifications and experience. Most of the other applicants for the Business Unit Leader positions and Operation Leader positions had better Qualifications and experience than Yee. Indeed he did not even meet the stated minimum experience requirement for many of the positions.

1990 Promotion Decisions

32. Yee may not assert this claim with respect to the denials of promotion in 1990 because the statute of limitations has expired. See California Code of Civ. Proc. § 3 3 9 (1) (two-year statute of limitations for contracts not based on a written instrument). *See also* Turner v. Anheuser-Busch, Inc., 20 Cal. App. 4th 1183, 1188 n.1, 12 Cal. Rptr. 2d 656, 659 n.1 (1992).

33. Even if this claim were not so precluded, the uncontroverted facts establish that Hughes' promotion decisions in 1990 were made in good faith, based on Yee's relative qualifications and experience, and not motivated by his race or national origin.

34. Yee raises no issue of fact as to Hughesf alleged breach of contract or breach of the implied covenant. Defendants are, therefore, entitled to summary judgment on Yee's claim for wrongful termination.

35. To the extent that any Uncontroverted Fact is deemed a Conclusion of Law, it is incorporated herein by reference.

DATED: January 6, 1995

Mariana R. Pfaelzer
United States District Judge

DOCUMENT 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VINCENT MAXIMILLIAN YEE, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, LARRY SPICER, TERIAN DAY, GARY OSBORN, FRANK TAORMINA, STEVE DORFMAN SUE HUNGATE, Defendants-Appellants.	)	NO. 95-55204 D.C. No. CV 93-00903-MRP **MEMORANDUM**[1]

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted July 10, 1996
Pasadena, California

Before: FERNANDEZ and TASHIMA, Circuit Judges and

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of thhis circuit except as provided by 9th Cir. R. 36-3.

MEHRIGE, District Judge[2]

Vincent Maximilian Yee appeals the district court's grant of summary judgment in favor of Hughes Aircraft Company, Larry Spicer, Terian Day, Gary Osborn, Frank Taormina, Steve Dorfman and Sue Hungate on Yee's action alleging that he was terminated from Hughes in violation of Title VII, 42 U.S.C. §2000e, and 42 U.S.C. §1981. We affirm.

DISCUSSION

A. Time-Barred Claims

The district court granted a partial summary judgment against Yee because it was determined that claims based on his 1989 and 1990 performance evaluations and his denial of promotion on 1990 were time-barred. We agree.

A Title VII claim, which is first filed with a state agency, must be filed within 240 days from the date of the challenged action. EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 111, 108 S. Ct. 1666, 1669, 100 L. Ed. 2d 96 (1988); Green v. Los Angeles County Superintendent of Schs., 883 F.2d 1472, 1474 (9th Cir. 1989).

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2 The Honorable Robert R. Merhige, Jr., Senoir United States District Judge, Eastern Disdtrict of Virginia, sitting by designation.

In August of 1992, Yee filed a complaint with the California state agency. Although Yee alleged that his promotion was not denied until March 1992, the district court correctly determined that Yee was told in May 1990 that he would not be given the promotion in question. Challenges t the 1989 and 1990 appraisals, which were made in March 1990 and March 1991 respectively, and to the denial of Yee's promotion and transfer were not file within 240 days of their occurrence and are, therefore, time- barred. See 42 U.S.C. §2000e-5 (e) (1); Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1444 (9th Cir. 1994), cert. Denied, __ U.S. ___, 115 S. Ct. 936, 130 L. Ed. 2d 881 (1995); Commercial, 486 U.S. at 111, 108 S. Ct. At 1669; Green, 883 F.2d at 1474.

However, Yee now argues that acts occurring outside of the actionable time period can still be actionable if he can show that they are part of a "continuing violation: of Title VII rights. See Sosa v. Hiraoka, 920 F.2d 1451, 1455 (9th Cir. 1990). That is true, but Yee failed to present that theory to the district court. Generally, we will not consider an issue raised for the first time on appeal. Woods v. Saturn Distrib. Corp., 78 F.3d 424, 430 (9th Cir. 1996); Spurlock v. F.B.I., 69 F.3d 1010, 1017 (9th Cir. 1995). Because the absence of a

continuing violation assertion resulted in a record which was not properly developed in the district court on that point, we decline to consider the issue. See A-1 Ambulance Serv. v. County of Monterey, 83 F.3d 298, 304 (9th Cir. 1996); Spurlock, 69 F.3d at 1017; see also Woods, 78 F.3d at 430.

B. Lay Off Claims

Yee was one of over 800 employees laid off by Hughes in November 1992. He timely filed a claim with the EEOC in which he asserted race discrimination and retaliation. He asserts those claims now.

1. Racial Discrimination

In a Title VII action, the plaintiff must first come forward with evidence of a prime facie case of discrimination, then the burden shifts to the defendant to come forward with evidence of a nondiscriminatory reason for the action, and finally the plaintiff has an opportunity to present that the defendant's reasons were pretexts. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, 67 L. Ed 2d 207 (1981) (citing McDonnell Douglas Corp. V. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688 (1973)); Wallis v. J.R. Simplot Co., 26 F.3d 885,

889 (9th Cir. 1994) (evidence required to make out prima facie case is minimal). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253, 101 S. Ct. at 1093. Assuming that Yee established a prima facie case, Hughes spelled out nondiscriminatory reason for the layoff -- adverse economic conditions. Yee failed to present evidence to demonstrate pretext. Asians were not disproportionately affected by the layoffs (the percentage of Asian employees increased); nor did he present evidence to show that his layoff was racially motivated. Cf. Washington v. Garret, 10 F.3d 1421, 1434 (9th Cir. 1993). Hughes presented evidence that the layoffs were determined based on skills, performance and company needs, Yee failed to present evidence to demonstrate that race was a factor used in the layoff procedure.

2. Retaliation

Yee also claims that he was retaliated against by Hughes for engaging in action protected by Title VII. "Under section 704(a) of Title VII." Miller v. Fairchild Indus., Inc., 797 F.2d 727, 730 (9th Cir. 1986); see also Moyo Gomez, 40 F.3d 982, 984 (9th Cir. 1994),

cert. denied, ___ U.S. ___, 115 S. Ct. 732, 130 L. Ed. 2d 635 (1995); Johnston v. Horne, 875 F.2d 1415, 1421 (9th Cir. 1989).

To the extent that Yee now claims that his discharge was retaliation for filing his prior Title VII court action, his claim must fail. The common thread which could connect his prior Title Vii action and his court-ordered reinstatement with his current termination was severed when he failed to argue that there was a connection between that earlier action and the current layoff. We decline to mend the thread on appeal. See A-1 Ambulance, 83 F.3d at 304; Spurlock, 69 F.3d at 1017; see also Woods, 78 F.3d at 430. Hughes discharged Yee based on his poor performance appraisals. However, those appraisals have simply become historical facts which might be unfortunate but whose lingering effects do not make reliance upon them discriminatory. See United Air Lines v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed. 2d 571 (1977).

To the extent that Yee now claims that his discharge was in retaliation for his EEOC complaint filed a few weeks earlier, his claim must again fail. A casual connection may be inferred from the proximity of protected action to a discharge. Miller, 797 F.2d at 731. However, Hughes rebutted any inference of discrimination by

demonstrating that Yee was chosen as one of the employees to be laid off based on skill, performance and company needs. Because Yee failed to submit evidence to demonstrate that Hughes' reasons were pretextual, summary judgment was proper. See Id. At 731-312.

C. Section 1981 Claim

Section 1981 protects the rights of all persons, regardless of race, "to make and enforce contracts." 42 U.S.C. §1981. The prime facie case for a §1981 claim is the same as that for a Title Vii race discrimination claim. See Rodriguez v. General Motors Corp., 904 F.2d 531, 532 (9th Cir. 1990). "As with Title VII disparate treatment actions, claims under section 1981 require proof of intentional discrimination." Miller, 797 F.2d at 733.

As we have already stated, Yee failed to submit evidence of racial discrimination. Thus, summary judgment on Yee's §1981 claim was appropriate. Cf. Id.

D. Covenant of Good Faith and Fair Dealing

Under California law, the standard elements of a cause of action for breach of contract are a contract, plaintiff's performance or excuse of nonperformance, a breach by the defendant and damage t the plaintiff resulting from defendant's breach. Regan Roofing Co. v.

Superior Court, 24 Cal App. 4th 425, 234-35, 29 Cal. Rptr. 2d 413, 418 (1994). "California law implies a covenant of good faith and fair dealing in every contract." Mundy v. Household Fin. Corp., 885 F.2d 542, 544 (9th Cir. 1989) (citation omitted). "The implied covenant imposes certain obligation on contracting parties as a matter of law -- specifically, that they will discharge their contractual obligations fairly and in good faith." Id. (Citing Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1169, 226 Cal. Rptr. 820, 828 (1986)).

For purposes of summary judgment, Hughes conceded that it needed good cause in order to terminate Yee. However, the record shows that Yee's evidence was insufficient to demonstrate that the dismissal action itself lacked good cause or that there was any actionable breach of the covenant of good faith and fair dealing relating to the employment contract.

AFFIRMED.

DOCUMENT 4

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE NINTH CIRCUIT

JUDGE FERNANDEZ: Say that we are honored to have Judge Merhige from the Eastern District of Virginia here to help us give you speedy justice on the calendar -- it really is an honor to have him with us.

JUDGE MERHIGE: Thank you, its an honor to be here.

JUDGE FERNANDEZ: The one case on the calendar today -- is this working?-- its alright, okay?-- one case on the calendar today the matter of Colbertson v. Schubert (?) is scheduled to be submitted on the briefs, it will be ordered submitted on the briefs at this time. Counsel there is a clock there, I think, and if you all would try to watch the clock for your timing I will try when there is about 2 minutes of your time left to do something like this it neither means peace nor victory, it simply means that you have got 2 minutes left -- I may forget. I might get so tied up in your argument that I would forget about it or you may be looking somewhere else, so watch your own time but I will try to give you a little hint when you've got just 2 minutes left. The first case is Yee v. Hughes Aircraft. You may proceed.

MJCS: I request to reserve 5 minutes for rebuttal.

JUDGE FERNANDEZ: Watch your time and save it. I won't tell you when you are getting close to your 5 minutes. Watch your time and save it. It's just fine. You may proceed.

MJCS: Thank you. If please the court, this is a title VII termination case in which the appellant seeks reinstatement. It's brought by a citizen of the United States of Korean and Chinese heritage, Mr. Yee. We also have a breach of employment contract cause on appeal, and we have a breach of the implied covenant of good faith and fair dealing, also on appeal. We believe, in terms of the facts below, this is granted on summary judgment so it is to de novo before the court, that we have established, at least in terms of triable issues of fact, that there has been discrimination and retaliatory discharge against Mr. Yee by Hughes, and we have overcome the hurdle of the reduction in force in that it is offered as a pretext and we believe we have established facts sufficient to go to trial on those issues. Also on appeal is an issue with regard to the jurisdictional limit of the Title VII claim. The court should be aware from the briefs that Mr. Yee was reinstated by district court order in 1989 for prior discrimination which specifically was found to have included the wrongful changes of the appraisal evaluations by the Department of Human Resources

in order to effectuate that termination.

JUDGE FERNANDEZ: But the ultimate conclusion was not changed, was it? They changed the praiseology. They didn't change the ultimate conclusion.

MJCS: Your Honor, I'm just going back in history in terms of the 1989 ruling of the district court where they reinstated Mr. Yee to Hughes, and at that time what they founds was that Hughes had discriminated, and that the human resources department the head of the Human Resources Department had altered his evaluations and appraisals in a discriminatory manner in order to terminate him. Therefore he was ordered reinstated in 1989. So, it's in that context that this case begins, so we have Mr. Yee reinstated to Hughes in 1989 with an admonition that he is not to be discriminated against and that he can only be terminated for just cause. And now we are looking at from 1989, until rather May of 1989, until 1992, September of 92, when Hughes provided a lay off notification. So, the entire frame work within terms of this case is, involves 3 evaluations: 1989, 1990 and 1991. We believe that we have shown a continuing pattern on the part of Hughes with regard to the evaluations because they used the evaluations in the ratings given to Mr. Yee in the term, ultimate termination

decision.

JUDGE FERNANDEZ: Here is the thing that I think you have -- one needs to focus on -- or you need to focus on. At the district court level on, let's say, on the termination itself, the paperwork and the argument presented to the district court did not say that. It said, as far as I can read it, that the retaliation was retaliation for filing his later 1992, I think it was claim, it didn't make the argument to the court that that was the situation. As a matter of fact on their summary judgment motion it seems to me the only argument made was, well you should have chosen someone else, I think it was like a 3 page response and it said "you should have chosen someone else". That's kind of by way of saying I understand your argument to us now, which you are saying now. The problem is or the thing that you need to sharpen is, how do we know that that's what was infront of the district court? In other words, the court was told the problem with this termination is that you discriminated against Asians, in general, and maybe there was somebody else you should have terminated instead. And the court said No, that's just not true. That's not demonstrated and it ruled. Why should we go beyond that in considering this case or would we be going beyond that if we

consider it? That was a whole lot of questions at once. Would you like me to break it up?

MJCS: I know. I will try to address that, if I may, and I think it's a very important issue. Here, I think, we're arguing with fundamental rights and I think that the record that we have infront of the court of appeals is exactly the same record that was infront of the trial court. Obviously we have different counsel, and hopefully our briefs are a little more sufficient. However, the facts were there they were all there, all of the ones that we rely on were infront of the court, and this court is reviewing against its summary judgment and its on the causes of action as plead all of the causes were plead in the EEOC complaint and in the cause of action retaliation was alleged in the termination, and not the retaliation that may have been covered in the brief but was in the complaint.

JUDGE FERNANDEZ: Well, let me put it more sharply then, is it your position that when one is faced with a summary judgment motion in district court and we have this great infrangible mass of facts and evidence and stuff out there, and the person goes to the district judge and says "Judge. My argument is my opposition to summary judgment is X" and the judge says "I'm sorry. You lose". Is it your position that in

that situation then, you kind of use that as a pass key and now you come to the court of appeals and you go back into the whole mass and you say "I've got Y, Z, A, B and C that I want you folks to decide abinitio (?) On summary judgment." Is that your position, that that is an appropriate, never mind the word appropriate, is that your position?

MJCS: It is my position your Honor, that the court has jurisdiction to do that. The rules are quite specific in terms of the record below that the court may rely upon. Also, I believe in our reply brief, we cite to the fact that with regard to a fundamental right, the court has a broad power to do some justice here. And, we are not asking the court to go outside of what was before the trial court. We are asking the court to go outside what was outside what was in the brief of the attorney representing the appellant.

JUDGE FERNANDEZ: In other words you are saying that, if one looked at this whole case on both pieces of the summary judgment, one can trick out, and I don't mean that in a negative sense, but one can trick out a continuing violation claim stemming from the original district court Title VII case and when one tricks that all out, one can bring in the 1989 and 1990 activities and one can bring in all the way forward this

termination is really a piece of that, right?

MJCS: That's precisely our position.

JUDGE FERNANDEZ: I understand it.

MJCS: And we believe that it is a continuing violation. I think, touching on that point, -

JUDGE MERHIGE: You are telling me, that may well be. That thought occurred to me as I read the briefs, buth the trial court was never informed that there was any contention of that. One statement in there, I believe, that they have always discriminated, something to that effect, but the court had no opportunity to rule on whether it was a continuing violation. I realize it was pro se I believe.

MJCS: On the matter of the notice of appeal, he was represented -

JUDGE MERHIGE: Well, there's even less excuse then.

MJCS: Well your Honor, but if you review the declarations of Vincent Yee, that is where the facts are laid out. All of the facts that are necessary to rule -

JUDGE MERHIGE: Why didn't they say that to the trial court.

MJCS: But that they were supplied to the trial court. They weren't covered in the brief. Counsel for Hughes is very

sophisticated and has given you the rather --

JUDGE MERHIGE: Well, you are not bad yourself.

MJCS: Well, thank you your Honor. But my point is you know from sitting on the bench that when you have a brief and you have declarations, the Hughes declarations here in California instead of affidavits, that you rely on the brief and the argument of counsel but you go right to the declarations, the first thing you should be looking at are the facts that's before you. What is it that you are considering in terms of granting summary judgment? And as a jurist when you read the facts that are laid out here, the declarations of Vincent Yee that were presented to the court, the evaluations and all of those facts that were infront of the court were sufficient, that sitting alone and reading them, you wouldn't know that summary judgment was not proper. Now, counsel's brief may have been 2 or 3 pages but it relied upon the declarations and we have submitted in our appendix those very same declarations and all of the declarations that were supplied to the court are the ones that we rely on in our brief. So the judge in looking at the summary judgment had the very declarations that we are arguing here. What the judge did not have was the benefit of, shall we say, an exhaustive brief on the subject. But

he or she certainly had all of the facts. And he or she, having the facts infront of it, and I believe it was a she, certainly had the power to look with a careful eye at the argument that was being made by Hughes because it disputed facts that give raise to a denial of a motion for summary judgment.

JUDGE FERNANDEZ: The difficulty is structurally of, you know, I know we are talking about this wonderful thing of jurist with incredible amounts of time to ferrite everything out but you know everybody depends on lawyers to tell them what the issues in the case are, and I am sure Judge Felzer who is an incredibly good and incredibly precise judge depended on something, I suppose like this, you can look in the whole world, you can look at a mass of facts but somebody has to tell you what issues are and if nobody is disputing particular issues, that's a problem. Let me ask you a question, if we adopt your position then I think you would say pretty clear we need to reverse. If we do not adopt your position, what's clear then?

MJCS: An unjust result occurs.

JUDGE FERNANDEZ: In other words we should not reverse. We would, in your view, we would adopt an injustice but if we didn't say it can now be resurrected now is it pretty clear, you don't have to give this up, I won't take it as an

admission. But is it fairly clear that these issues weren't really presented to the district judge.

MJCS: I believe they were presented. I believe every one of the issues were presented to the judge all be it --

JUDGE FERNANDEZ: I mean as opposed to an -- the facts should have just emanated -- rising out of the facts the judge should have known it --

MJCS: No, I believe that if you look at the complaint and if you look at the pleadings every single issue is raised. They were not raised, and I think the court in reviewing issues knows that they at least they were raised. They were raised in the brief and they were raised in the declarations and they were raised in the complaint. And so we don't have an issue --

JUDGE TASHIMA: When you say raised, you mean the brief says "we contend that there was a continuing violation".

MJCS: There is at least the mention of a continuation. Yes. Either that either in the brief or in the oral argument.

JUDGE TASHIMA: We can maybe attack this differently. Another reason for requiring some kind of notice to the issues you are raising is to give the other chance to file opposition. If it's not fairly raised, the party wont file opposition. Who knows what kind of affidavit the other side might have filed if

they thought an issue was raised that they thought was not raised. Now, but you have not really replied directly to your argument made by your opponent on page 17 of their brief which cites to general rule about the appellant court not considering an issue unless it was expressly raised and considered by the trial court. You want to reply to that now? Are you saying we should disregard that rule or it doesn't apply.

MJCS: Your Honor, in our reply brief, I believe we addressed that.

JUDGE TASHIMA: You mention none of those cases at all. You never mention Singleton, Brooks, Whittaker, Scott.

MJCS: I believe we cited, Silver v. Mendel, out of the 3rd Circuit and we cited United States v. _____ --

JUDGE TASHIMA: You are saying we should disregard 9th Circuit law involved in the 3rd Circuit?

MJCS: I would never suggest that you disregard 9th Circuit law your honor?

JUDGE FERNANDEZ: I'm sorry.

MJCS: I would not suggest you disregard 9th Circuit law. What I would suggest your honor, is that the, you know, Im gonna reserve some time your honor, and I'm gonna look on

my rebuttal, if you wouldn't mind, I'll address that issue.

JUDGE FERNANDEZ: Sure.

WAYNE FLICK: Good morning your honor. Wayne Flick of Latham & Watkins on behalf of Hughes. Forgive me, I have a little bit of a cold this morning. May it please the court, as much as anything else, this is a case about rules. And I believe that there is actually one rule about which the parties agree. At page 10 of Mr. Yee's reply brief, he cites to this court's 1994 decision in Schneider v. San Diego, which in turn relies upon the court's 1990 decision in Brogun v. San Mateo. And as Mr. Yee points out and as those cases hold, this court's review is limited to the record that was presented to the district court at the time of summary judgment, and if I may also refer to what many of us Judge Tashima regard as the bible, there is a statement in the Federal Practice Guide which says that the court is not obligated to consider matters not specifically brought to its attention. It is immaterial that helpful evidence may be located somewhere in the record and I think that really goes to the heart of this case and its critical to the outcome.

JUDGE FERNANDEZ: You know there's a word "obligated" that you just said to us. Suppose we say, Oh well, we may not be obligated but we surely aren't disinpowered"

and I say suppose by way of posing a question that I pose the reverse of to opposing counsel. Suppose we did say "oh well, we can figure out a continuing violation from the facts of this case, and we can figure out that there is some evidence to suggest that if one only presented the issue properly and so that's what we think was going on here". What happens then to your side of the case?

WAYNE FLICK: May I answer that question your honor by addressing some of the specific issues that I think this court would then have to look to if it were going to --

JUDGE FERNANDEZ: Sure, as long as you answer the question.

WAYNE FLICK: Yes, I will, I hope so. Let me start first with the 1989 and 1990 performance appraisals. As we've said in our brief, they were time barred by the time Mr. Yee filed his first EEOC charge. In order to resuscitate them, the court would have to apply the continuing violations doctrine, which I believe was raised for the first time on appeal. Even, however, if the court decided to do that, whether or not the court decides to do that, I think that there is a more compelling reason why the court should disregard those performance appraisal. Because in the court below in response to the first

summary judgment motion, Mr. Yee unambiguously conceded any issue of discrimination with respect to those two performance appraisals. At page 3 of his opposition memorandum, which is contained in supplemental excerpts number 3, he said, and mind you this in the midst of discussing the promotion or the alleged promotion decision with respect to Mr. Tormina's division. He says, "Please note that there are no other parts of his complaint which allege that he was also discriminated against by Defendants in 1989 and 1990." No other parts. Now, in reliance on that, Hughes in its reply memorandum said to Judge Felzer summary judgment is not necessary with respect to those two performance appraisals. We also submitted an amended statement of proposed uncontroverted facts which now omitted any reference to them and Judge Felser in her order granting summary judgment crossed out the portion of that order, which we had proposed, which related to those performance appraisals. I cannot, I think its difficult to imagine a clearer case of conceding an issue than what Mr. Yee did with respect to those two performance appraisals.

JUDGE FERNANDEZ: Then there's the promotion.

WAYNE FLICK: Pardon.

JUDGE FERNANDEZ: Then there's the promotion. 1990 promotion?

WAYNE FLICK: Then there's the decision with respect to the promotion. Now, again, the district court applied Delaware State College v. Ricks to conclude that a statute of limitations began running at the time that decision was made and at the time it was communicated to him, which was in May of 1990. He did not file his first EEOC charge until over two years later. There's a decision which is -- was not brought to the attention to the district court and it is inexplicably omitted from my brief as well. Its this court's 1994 decision in Faubs v. Holy Cross Health System, its at 29 F3d 1439.

JUDGE FERNANDEZ: Give us a so called gum sheet on that, will you please. Give the clerk a little paper that has that written out and then I'll have it. That's how we take additional things.

WAYNE FLICK: Certainly. In Faubs the Ninth Circuit applied Delaware State College v. Ricks in a context that is very similar to what was presented to the Supreme Court in Ricks and said that the statute of limitations begins to run when a decision such as a promotion or a transfer is made and communicated, and that the use of a internal grievance

procedure does not, in any way, toll that statute of limitations. I think those two cases make clear that the issue of that decision was time barred. However, if the court then decides that it is appropriate to apply the continuing violations theory, to resuscitate any allegation with respect to that decision, I think what this court said in Coopers and Librand (?) which is cited in our brief disposes of that issue. This court said that absent special circumstances a single act by an employer such as a discharge, a lay off, or a failure to transfer or promote begins the running of the statute of limitations and any effects of that allegedly discriminatory act are not to be regarded as continuing. And that's because a decision such as a failure to promote or to transfer or a lay off or a discharge is a discreet decision, one reasonably should know at the time a decision like that is made and implemented that it was discriminatory, if in fact it was. And it is incumbent upon the person involved to file a charge and to file a lawsuit. So now, whether the court decides that in fact Judge Felser was correct in applying Ricks and simply found that decision to time barred or whether the court decides to apply the newly raised continuing violations theory here, I think under this court's precedence the continuing violations theory won't save that decision and

therefore it should not be considered. That then takes us to where your honors began with Mr. Scudi with the lay off and what was presented to the district court in the second motion. You've read the two page opposition memorandum to our summary judgment motion, and I know that that was the second opposition memorandum. Over Hughes objections, Judge Felser permitted Mr. Yee, at the hearing on that motion, 2 more weeks to provide another opposition memorandum because his first was non-responsive. That brief does not argue continuing violations, it does not argue retaliation, and I would note your honor, that the only place I see retaliation anywhere in the record below is in the introductory paragraph of the complaint. It is never elsewhere argued. The only thing Mr. Yee said in that opposition memorandum was that he should have been compared to different people for the purposes of lay off. I think in certain respects, Judge Merhige, this is much like the case that was presented to you in 1994, the Travelers decision, where you noted in that decision that in a case such like this, in order to rebut the defendant's legitimate non-discriminatory reason, the plaintiff has to, applying the Supreme Court's decision in Ricks, the plaintiff has to show that the articulated reason was false and show that the decision

was in fact based upon discrimination, and you noted in a footnote on that decision your honor, that the plaintiff had admitted that there was no direct evidence of discrimination. In our opposition brief at page 31, from a passage, quoted a passage from Mr. Yee's deposition. Question. I am asking you about the facts that support your allegation, not about what might have happened or what could have happened. So, I'd like to know what facts you are aware of that supports your allegations that you were discriminated against when you were laid off in November 1992. Answer. I don't recall at this point. I don't recall. Well, apparently when he filed his opposition memorandum, he didn't recall either, because he didn't present any evidence to the district court.

JUDGE FERNANDEZ: Well, suppose he says now -- Look judges. Here is what happened. Judge Felser ordered me reinstated way back when, in that other Title VII action, so we know these folks are bad actors. They had to be beat up once and we're back at it again. Now when they came to make their lay off decision, the lay off decision was based upon my evaluations, my record and such, and every one of those would go down like this. First, I get a bad evaluation and its really because I squawked the first time. Then, I get a second bad

evaluation because I squawked the second time, and now I got a third one cause I squawked a third time. And so I've got a bunch of junk in my file that makes me look bad, and so I got laid off. And all of that is based upon this continuing violation of my rights. Each time they are discriminating against me and the ultimate discrimination becomes when they lay me off. -- And that is his argument. What do you want to say to that?

WAYNE FLICK: Let me respond in two ways. Number one, it is, of course, not an argument that was presented below. But more importantly, lets look back, forget all of my legal arguments and lets look back at the substance of those appraisals. The first two appraisals, the 1989 and the 1990, your honor you just characterized them as bad. He received overall evaluations of meets Hughes expectations. There is no dispute that substantively his performance was good. Both of his supervisors, who authored both of those evaluations, I think, candidly knowing Mr. Yee, rightly concluded that he has difficulty with authority, he was argumentative, he was resistant to any sort of constructive criticism, and as he even said in his deposition, he always believed that he did the job as well as the CEO could do it. And that was the demeanor with which he approached all decisions and contacts with managers.

JUDGE FERNANDEZ: Meets expectations like a C, right? Meets expectations like if were in an old fashioned school setting, that's like a C, right? Then you could get a B, which is a little higher and you can get an A or you can get a D which means that you are on the verge of flunking out.

WAYNE FLICK: Or an F.

JUDGE FERNANDEZ: Or an F, right.

WAYNE FLICK: That's right.

JUDGE FERNANDEZ: To me, they gave him sort of a C.

WAYNE FLICK: And that's correct. And Susan Golan the Human Resources consultant who ultimately passed on the lay off, tells the court in her declaration that it meets Hughes expectations is average. Mr. Yee, on the other hand, contends that it is somehow a black list. There is no evidence on the record. So, I would first say that those two performance appraisals were not bad appraisals, there is no real evidence that there was any effort either by Mr. Brown or by Mr. Bilderback to down grade him because of the former lawsuit. At most, I think what we have here is a difference of opinion between Mr. Yee and those two supervisors with regard to the overall quality of his performance and I think that explains why in a district court he conceded any issue of discrimination in

those two evaluations. I think it is an enormous leap for this court to reach over that concession, to reach over the time barr, to reach over the continuing violations theory and find anything in those performance appraisals that supports a retaliation theory that was never advanced in the district court.

JUDGE FERNANDEZ: But if you are an A student and your professor says, you know, I don't like Asians and gives you a C, one would get a feeling that that was discriminatory, right?

WAYNE FLICK: Absolutely.

JUDGE FERNANDEZ: But we really are an A and they give you a C and so he grieves about that. I think he grieved about that.

WAYNE FLICK: But there is no evidence in the record that either Mr. Brown or Mr. Bilderback ever made such a decision, or made such a statement that I don't like Asians. And there is no evidence in the record that any of the individuals involved in the challenge decisions here were involved in what happened to Yee.

JUDGE FERNANDEZ: How about, I don't like folks who aren't team players and who are always throwing sand in the gears. Things along that line. Don't like non-team players. You really ought to learn to be a team player instead of filing

lawsuits. You really ought to stop grieving when I give you a C you ought to stop grieving it because, if anything, that demonstrates you sure aren't a team player. You don't know how to take it like a man and better yourself. You're just a whiner. How about that?

WAYNE FLICK: Your honor, with all due respect, if this court can find any statement such as that in this record then I would urge reversal. There is no such statement in this record. No such evidence.

JUDGE TASHIMA: The fact of the matter was, didn't he have the lowest rating over former people who were considered for the lay off?

WAYNE FLICK: He did in the 1991 performance appraisal and now if I may, I'd like to actually address that. I think I did. I think I made the point that that -- no I didn't. The 1991 appraisal was never an issue in the court below. The first two were and we talked about how the court disposed of it. The 1991 appraisal like his first two is not mentioned in his complaint. As a consequence it was not the subject of either of the two summary judgment motions. It was never raised in either of the three opposition memoranda which Mr. Yee presented to the district court. Its not listed in his own

statement or genuine issues of material fact at summary judgment. And there is no single reference to it in Judge Felser's 17 page order granting summary judgment. It was not an issue until we reached this court, and with all due respect to counsel, until Mr. Yee's new counsel decided that it was an essential factual matter that he needed to support the new continuing violations theory. There is no allegation below that that performance appraisal was discriminatory.

JUDGE TASHIMA: Let me change the focus just a little bit. Even assuming Plaintiff doesn't have a viable continuing violations theory because he didn't raise it in the District Court. Isn't it a fair argument to say that these earlier appraisals are evidence from which you can infer racial intent in his layoff later? Isn't that sufficient to overcome summary judgment on the Title VII layoff claim?

WAYNE FLICK: I think that is an important claim your honor. I think we need to distinguish between whether or not something can be a liability creating a vent or whether it can be mere relevant evidence which the court can consider with respect to something that is not time barred. With respect to the 89 and 90 performance appraisals, I think, we win on both issues. It cannot be a liability creating a vent because of the

reasons I've argued. It also can't be relevant evidence --

JUDGE TASHIMA: Well, why can't it be?

WAYNE FLICK: Because Mr. Yee conceded that there was no issue of discrimination. When Mr. Yee says, Those appraisals --

JUDGE TASHIMA: In his deposition?

WAYNE FLICK: In his opposition memorandum at summary judgment. He conceded the issue. So, I don't see how this court can conceivably regard them as relevant to anything when he himself says they are not discriminatory. And since he never raised any issue in the court below with respect to the 1991 appraisal, I don't see what that can be relevant to. I think its clever, its a clever attempt to try and support the new continuing violations theory but it was not raised below and he never alleged that it was discriminatory. So to the extent that the court might consider whether or not they should be considered as relevant evidence, I think he himself has disposed of that argument. If I may, your honor, I'd like to reserve my last 3 minutes to respond.

JUDGE FERNANDEZ: No, could we go 1, 2, 3, stop.

WAYNE FLICK: Okay, I think I have actually addressed all of the substantive issues, I just would close by saying that I

recognize the factual and the legal back drop against which this case which we've come to call as Yee II stands. In my view there was one district judge who was best positioned to consider all of Mr. Yee's allegations and the entire record that was before her against that back drop. And it was Mariana Felser. And I think that the record below and the very detailed statements of uncontroverted facts and conclusions of law that she issued make very clear that she looked well beyond the mere two page opposition memoranda that were submitted. That she did look through the entire record. And that she could find no triable issue. And I don't think that she had any choice but to grant summary judgment on that record.

JUDGE MERHIGE: The response to the motion for summary judgment was almost a give away, wasn't it?

WAYNE FLICK: Yes.

JUDGE MERHIGE: Practically admitted.

WAYNE FLICK: Yes. And to the extent that there was more to that response in the form of Mr. Yee's genuine statement of, of, the statement of genuine issues and material fact, the local rule for the central district made very clear that that responsive statement has to cite to specific evidence that supports the fact that it is disputed and there is no citation to any evidence

whatsoever in that document. It's a list of 10 or 11 restatements of the mere allegations that are in his complaint. Thank you very much your honor.

JUDGE FERNANDEZ: Thank you. Well, you reserved about 41/2 minutes.

MJCS: Thank you your honor. There was no stipulation on the record, we reviewed the record in looking for the alleged stipulation conceding and what we found was that there was a discussion on the record where counsel, we cited in our reply brief on page 6, where it basically says you know he's just beginning to learn about the performance appraisals. For example, they're used in lay offs, so he didn't really concede anything. What he said is I'm not quite sure what this is all about. That's what the counsel said, it's quoted on page 6 in our reply brief. As to the issue about the question as to whether or not this court can go beyond what was raised in the briefs, on page 7 we cite the Donovan case out of the 9th circuit in 1980 for the proposition at least that with regard to issues of law like jurisdiction, the court can go beyond what was briefed if there's enough facts in there. So there are facts before the court that will allow it under jurisdictional issue to go beyond the jurisdiction saying that there is no continuing

violation. In addition, I would like to focus on the argument that the termination itself is in September of 1992, the EEOC complaint was filed in August 1992, and the denial of the grievance procedure in which involved the 1989 and 1990 appraisal evaluations did not occur until March of 1992. And so those three evaluations and the termination of Mr. Yee's in-house appeal in March are the basis upon which the ultimate determination was made to terminate Mr. Yee. And those give the court enough in and of themselves to meet a Title VII discrimination count, and clearly, all of those things are within the record, and clearly, all of those would not be time barred. However, by reviewing those things, it does bring back in and you do look at the evaluations from 1989 and 1990. And remember that those are performed the year after that evaluation. I would also indicate to the court that within its discretion the case may be remanded further proceedings, and that may be an alternative to a reversal--

JUDGE MERHIGE; If you're right. Wouldn't that be the proper procedure?

MJCS: That would be the, we would be delighted with that result, your honor. And we believe that it's justified in this case. And, really, if you look at , I think if you look at

Donovan and you could look at the line of cases in terms of the court of appeals looking at issues of law and reviewing the factual records before them, we're not asking the court to go beyond its power, we are not asking the court to go beyond what's dictated in the 9th circuit with regard to the review. But we are asking the court because this is a fundamental right we are asking the court to take a close look at this at this discrimination against a minority, and as a result we are asking the court then to remand this matter. I would also indicate that certainly in terms of the time issues, with regard to the breach of the covenant of good faith and fair dealing and the 1981 action of breach of contract, those claims are not time barred. So you really don't have to address those issues in terms of the time barred ruling with regard to continuing violation, and we believe that we have established at least issues of fact as to all those as well. So we would ask the court, cordially ask the court to remand this for further proceedings. Thank you.

JUDGE FERNANDEZ: Thank you counsel. This matter will stand submitted. We ---------end of tape.

Supreme Court, U.S.
FILED
FEB 3 1997
CLERK

No. 96-856

In The Supreme Court Of The United States

OCTOBER TERM, 1996

VINCENT MAXIMILIAN YEE, PETITIONER

v.

HUGHES AIRCRAFT COMPANY, LARRY SPICER, TERIAN DAY, GARY OSBORN, FRANK TAORMINA, STEVE DORFMAN, and SUE HUNTGATE, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did The Ninth Circuit Court Of Appeals Properly Decline To Consider Petitioner's Continuing Violations Theory When That Theory Was Raised For The First Time On Appeal And Was Not A Pure Question Of Law?

2. In Reviewing A Grant of Summary Judgment, Does The *De Novo* Standard Of Review Require A Circuit Court Of Appeals To Consider Theories Not Presented To The District Court?

LIST OF PARTIES

The Petitioner is Vincent Maximilian Yee.

The Respondents are correctly identified in the caption of the Petition with two exceptions: "Gay Osborn" is Gary Osborn and "Steve Dorman" is Steve Dorfman.

Hughes Aircraft Company's parent company, General Motors Corporation, has issued shares to the public, as have two of its affiliated entities, FLIR Systems, Inc. and Nippon Avionics Co., Ltd.

Wayne S. Flick of Latham & Watkins is counsel of record for all respondents, each of whom joins in this brief in opposition.

TABLE OF CONTENTS

Page

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED 5

I. Introduction. 5

II. There Is No Circuit Conflict On The Question Whether A Theory Must Be Considered For The First Time On Appeal 6

III. The Ninth Circuit Properly Applied The *De Novo* Standard Of Review. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Andersen v. Cunning,
827 F2d 1303 (9th Cir. 1987).....8

Childers v. Chesapeake & Potomac Tel. Co.,
881 F.2d 1259 n.1 (Fed. Cir. 1989).....7

Church of Scientology of California v. Cazares,
638 F.2d 1272 (5th Cir. 1981).....11

Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.,
1996 U.S. App. LEXIS 33863 (9th Cir. Dec. 27, 1996).....5, 7

Dillingham Construction N.A., Inc. v. Arceo,
57 F.3d 712 (9th Cir. 1995).....6

Estate of Kunkel v. United States,
689 F.2d 408 (3d Cir. 1982).....7

Friendly Farms v. Reliance Ins. Co.,
79 F.3d 541 (6th Cir. 1996).....7

Fry v. Melaragno,
939 F.2d 832 (9th Cir. 1991).....8

Golden Gate Bridge & Highway Dist. v. United States,
125 F.2d 872 (9th Cir. 1942).....5, 6

Haroco, Inc. v. American Nat'l Bank & Trust Inc.,
38 F.3d 1429 (7th Cir. 1994).....7

Helena Rubinstein, Inc. v. Bao,
433 F.2d 1021 (9th Cir. 1970).....11

International Union of Bricklayers v. Martin Jaska, Inc.,
752 F.2d 1401 (9th Cir. 1985).....6

Koelsch v. Beltone Elecs. Corp.,
46 F.3d 705 (7th Cir. 1995).....9

L.E.A. Dynatech, Inc. v. Allina,
49 F.3d 1527 (4th Cir. 1995).....7

Lambert v. Genesee Hosp.,
10 F.3d 46 (2d Cir. 1993).....7

LaMure v. Mutual Life Ins. Co.,
1997 U.S.App. LEXIS 537 (10th Cir. Jan 14, 1997) 7

London v. Coopers & Lybrand,
644 F.2d 811 (9th Cir. 1981).....9

Lorance v. AT&T Techs., Inc.,
490 U.S. 900 (1989).....8

Marbled Murrelet v. Environmental Protection Information Center,
83 F.3d 1060 (9th Cir. 1996).....7

National Recycling Coalition, Inc. v. Reilly,
884 F.2d 1431 (D.C. Cir. 1989) 7

Parks Sch. of Bus. v. Symington,
51 F.3d 1480 (9th Cir. 1995).....6

Reed v. Lockheed Aircraft Corp.,
613 F.2d 757 (9th Cir. 1980).....9

Salve Regina College v. Russel,
499 U.S. 225 (1991).....10

Shands v. City of Kennett,
993 F.2d 1337 (8th Cir. 1993).....7

Singleton v. Wulff,
428 U.S. 106 (1976).....6

Skinner v. City of Miami,
62 F.3d 344 (11th cir. 1995) 7

Telco Leasing, Inc. v. Transwestern Title Co., 630 F.2d 691 (9th Cir. 1980) 8

United States v. Conkins, 987 F.2d 564 (9th Cir. 1993) 6

United States v. Flores-Payon, 942 F.2d 556 (9th Cir. 1991) 6, 8

United States v. Martinez-Cortez, 988 F.2d 1408 (5th Cir. 1993) 7

United States v. Patrin, 575 F.2d 708 (9th Cir. 1978) 6

Unites States v. Newman, 982 F.2d 665 (1st Cir. 1992) 7

USX Corp. v. Tanenbaum, 868 F.2d 1455 (5th Cir. 1989) 7

Yee v. Hughes Aircraft Co., No. 95-55204, mem. op. (9th Cir. 1996) 3

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VINCENT MAXIMILIAN YEE, PETITIONER

v.

HUGHES AIRCRAFT COMPANY, LARRY SPICER, TERIAN DAY, GARY OSBORN, FRANK TAORMINA, STEVE DORFMAN, and SUE HUNTGATE, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Hughes Aircraft Company, Larry Spicer, Terian Day, Gary Osborn, Frank Taormina, Steve Dorfman, and Sue Huntgate (collectively "Hughes" or the "Company") respectfully urge this Court to deny the petition for writ of certiorari in this case.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, is the only relevant federal statute. 42 U.S.C. § 2000e, *et seq.* (1994). In particular, §§ 2000e-3(a) and 2000e-5(e) of that law provide:

> e-3(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . . .
>
> . . .
>
> e-5(e) [I]n a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred . . . .

STATEMENT OF THE CASE[1]

This is an action involving alleged employment discrimination against Petitioner on the basis of his race. Judge Mariana R. Pfaelzer of the Central District of California granted two substantive motions in this case: 1) Hughes' March 7, 1994 Motion for Partial Summary Judgment (the

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[1] Petitioner's "Statement of the Case," which is rife with evidentiary misrepresentations, is merely lifted from his Opening Brief in the Court of Appeals. As such, it refers to excerpts of the record ("ER") that were presented to the Court of Appeals, but which are not before this Court. The district court issued a detailed Statement of Uncontroverted Facts and Conclusions of Law, (*see Appendix to Petition for Cert.*, A-2 at 2-11), which the Court of Appeals did not disturb. Petitioner's recitation of the "facts," therefore, is inappropriate and should be disregarded. Respondents do not respond specifically to Petitioner's assertions.

"First Motion"); and 2) Hughes' June 27, 1994 Motion for Summary Judgment (the "Second Motion"), following which an "Order Granting Summary Judgment" was entered on January 9, 1995. Petitioner presented precious little in the way of evidence to overcome either of Respondents' motions; indeed, the district court gave him two opportunities to defeat the Second Motion because his first Memorandum in Opposition contained no pertinent evidence or argument at all. He thus had ample opportunity to present all evidence available to him, and to perfect any legal theories he believed applicable to the factual record.

In this Court, as he did in the Ninth Circuit, Petitioner contends that summary judgment was improperly granted because the evidentiary record supports a finding of continuing violations. At no time in the district court did Petitioner raise the continuing violations theory, however. *See Yee v. Hughes Aircraft Co.*, No. 95-55204, mem. op. at 3 (9th Cir. 1996), *reprinted in Appendix to Petition for Cert.*, A-3.[2] Indeed, Petitioner himself made discovery into his time-barred allegations unnecessary by conceding in opposition to the First Motion that the performance appraisals that were the subject of those allegations were not at issue. The factual record relating to those appraisals, therefore, was never fully developed in the district court. *See id.* at 3-4. ("Because the absence of a continuing violation assertion resulted in a record which was not properly developed in the district court on that point, we decline to consider the issue.") After putting to rest any question that those appraisals were at issue, Petitioner never sought to revive them until he reached the Ninth Circuit.

Petitioner does not seriously contend that he argued the continuing violations theory to the district court. *See*

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[2] The Ninth Circuit's memorandum opinion in this case is unpublished.

Petition for Cert., 28 ("Mr. Yee appealed the ruling and raised a new legal theory"). Nor does he credibly dispute that his own concessions in the district court rendered unnecessary any consideration of the facts underlying his time-barred allegations. Rather, he urges that the Ninth Circuit should have considered his newly-raised theory, despite the inadequate record to which he sought to have that theory applied, because the theory involves a pure question of law. He also contends that this Court should grant certiorari in this case to guarantee consistency among the circuit courts on this point. *See Petition for Cert., 21* ("This Court should announce a rule that recognizes the legal theory exception to the general rule so that there is consistency among the circuits . . ."). Contrary to his suggestion, however, consistency already exists.

Setting aside the time-barred allegations, Petitioner's discrimination and retaliation allegations relate only to his November 1992 layoff. The district court found that Respondents articulated a legitimate, lawful explanation for Petitioner's layoff (*i.e.*, adverse economic conditions), and that Petitioner presented no evidence of pretext. The Ninth Circuit agreed. *See* mem. op., 5 ("Assuming that Yee established a prima facie case, Hughes spelled out [a] non-discriminatory reason for the layoff . . . Yee failed to present evidence of pretext.), and 6-7 ("Hughes rebutted any inference of discrimination by demonstrating that Yee was chosen as one of the employees to be laid off based on skill, performance and company needs. Because Yee failed to submit evidence to demonstrate that Hughes' reasons were pretextual, summary judgment was proper."). Petitioner contends that this finding is erroneous because his time-barred allegations, which both courts below declined to consider, provided the evidence of pretext necessary to overcome summary judgment. Respondent urges that the basis of the

lower court's determination was sound. *See* mem. op., 6 ("The common thread which could connect his prior Title VII action and his court-ordered reinstatement with his current termination was severed when he failed to argue that there was a connection between that earlier action and the current layoff. We decline to mend the thread on appeal.") There are no grounds for granting the Petition.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Introduction.

Every federal circuit has held that theories raised for the first time on appeal will not be considered. Every circuit also recognizes a narrow exception to the general rule, where the newly raised theory involves pure questions of law. Thus, there is no split in authority requiring this Court's attention, and the exception the Petitioner asks this Court to announce for consistency's sake is already in place in every circuit.

Moreover, the continuing violations theory is not one to which the "pure question of law" exception applies. In order to determine whether a continuing violation exists, a court must evaluate events or conduct inside and outside the relevant statute of limitations, and determine whether they are sufficiently related to revive the otherwise time-barred allegations. This analysis necessarily entails factual questions. Thus, even if a split in authorities existed, and even if the Ninth Circuit was among the circuits that did not recognize the exception for pure questions of law,[3] this case would present no opportunity to bring about change.

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[3] The Ninth Circuit first recognized the exception in *Golden Gate Bridge & Highway Dist. v. United States*, 125 F.2d 872, 875 (9th Cir.), *cert. denied*, 316 U.S. 700 (1942), and has reaffirmed it in several recent cases. *See, e.g., Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 1996 U.S. App. LEXIS 33863, at *37 (9th Cir. Dec. 27, 1996) ("'We will

Finally, Petitioner's strained interpretation of *de novo* review finds no support in the decisions of any Court. Petitioner merely invites this Court to overturn the principle, well-established in every circuit, that appellate courts need not consider theories raised for the first time on appeal. Nothing about this case warrants such a drastic and imprudent change in the law.

II. There Is No Circuit Conflict On The Question Whether A Theory Must Be Considered For The First Time On Appeal.

The Ninth Circuit refused to consider Petitioner's continuing violations theory because Petitioner did not present it to the district court; it was raised for the first time on appeal. As a general rule, circuit courts will not consider such arguments. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Dillingham Constr. N.A. v. Arceo*, 57 F.3d 712, 717 (9th Cir. 1995) (refusing to consider an argument for the first time on appeal that was not raised in the district court) (citing *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985)), *cert granted, California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, ___U.S.___, 116 S. Ct. 1415 (1996).

Despite Petitioner's assertion to the contrary, every Circuit Court of Appeals recognizes an exception to this

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review an issue that has been raised for the first time on appeal under certain narrow circumstances,' including 'when the issue is purely one of law.'") (citing *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995); *United States v. Conkins*, 987 F.2d 564, 568 (9th Cir. 1993) (same); *United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991) (same)); *see also United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) ("Our circuit apparently has recognized a second, narrow exception to the general rule. When the issue . . . is purely one of law") (citing *Golden Gate*, 125 F.2d at 875).

general rule.[4] When the issue raised is "purely one of law and does not depend on an inadequately developed factual record," circuit courts have discretion to consider it. *Marbled Murrelet v. Babbit*, 83 F.3d 1060, 1063-64 (9th Cir. 1996); *see, e.g., United States v. Martinez-Cortez*, 988 F.2d 1408, 1415 (5th Cir.) ("An exception [to the general rule of non-reviewability] is usually made when the newly raised issue concerns a pure question of law"), *cert. denied, Martinez-Cortez v. United States*, 510 U.S. 1013 (1993); *USX Corp. v. Tanenbaum*, 868 F.2d 1455, 1459 (5th Cir. 1989) ("Although we do not ordinarily consider an issue raised for the first time on appeal, an exception exists when "a pure question of law is involved"). Petitioner's continuing violations theory does not fall within this exception, however, nor does he cite to a decision by this or any circuit court that holds otherwise. Even if Petitioner's newly-raised theory fell within the narrow exception, the Ninth Circuit was not required to consider it.[5]

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[4] *See United States v. Newman*, 982 F.2d 665, 672 (1st Cir. 1992), *cert. denied, Newman v. United States*, 510 U.S. 812 (1993); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993), *cert. denied*, ___U.S.___, 114 S. Ct. 1612 (1994); *Estate of Kunkel v. United States*, 689 F.2d 408, 414 n.5 (3d Cir. 1982); *Childers v. Chesapeake & Potomac Tel. Co.*, 881 F.2d 1259, 1263 n.1 (4th. Cir. 1989); *United States v. Martinez-Cortez*, 988 F.2d 1408, 1415 (5th Cir. 1993); *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 544-45 (6th Cir. 1996); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 38 F.3d 1429, 1439 (7th Cir. 1994); *Shands v. Kennett*, 993 F.2d 1337, 1343 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994); *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 1996 U.S.App. LEXIS 33863, at *37 (9th Cir. Dec. 27, 1996); *LaMure v. Mutual Life Ins. Co.*, 1997 U.S.App. LEXIS 537, at *8-9 (10th Cir. Jan 14, 1997); *Skinner v. City of Miami*, 62 F.3d 344, 348 (11th cir. 1995); *National Recycling Coalition, Inc. v. Reilly*, 884 F.2d 1431, 1437 (D.C. Cir. 1989); *L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1531-32 (Fed. Cir. 1995).

[5] Whether to entertain an argument first raised on appeal is a decision within the discretion of the appeals court. Recently the Ninth Circuit

The "pure question of law" exception to the general rule that circuit courts will refuse to consider arguments raised for the first time on appeal is plainly inapplicable in this case. Despite Petitioner's apparent confusion, identifying a purely legal question is a rather elementary undertaking. Simply put, if in reviewing the issue, the circuit court is not required to interpret the factual record, and need only apply a given body of law, then it may consider the issue under the "purely legal question" exception.[6]

Title VII requires a plaintiff to file a charge of discrimination with the EEOC within 300 days of the alleged act of discrimination if he previously files a charge with the equivalent state or local agency, and 180 days if he does not. 42 U.S.C. § 2000e-5(e). *See Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 903-04 n.2 (1989). Under the continuing violations theory, however, a plaintiff who establishes that a continuing policy and practice of discrimination operated within the statutory period, even though certain events fell

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explained that it had *"discretion* to review issues raised for the first time on appeal if to do so would not require the development of new facts." *United States v. Tisor*, 96 F.3d 370, 378 (9th Cir. 1996) (emphasis added) (citing *Andersen v. Cunning*, 827 F2d 1303, 1305 (9th Cir. 19878)); *see also Singleton v. Wulff*, 428 U.S. 106 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals . . .") (citing *Turner v. City of Memphis*, 369 U.S. 350 (1962)). In this case, even if Petitioner had raised a new, purely legal issue, reasoning from its own holding in *Flores-Payon*, the court might well have opted not to consider it because of the prejudice to Respondents of doing so. *See Flores-Payon*, 942 F.2d at 558 ("The general rule is supported by considerations of fairness and judicial efficiency.").

[6] *See, e.g., Fry v. Melaragno*, 939 F.2d 832, 835 (9th Cir. 1991) (holding that whether officials of the Internal Revenue Service enjoyed absolute immunity is a purely legal question); *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980) (finding that the conflict of laws issue is one of pure law, requiring no factual analysis whatsoever).

outside the statutory period, may satisfy the filing requirements. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir. 1980) (holding that continuing violation existed only after plaintiff showed that a "policy of discrimination" occurred "each day of her employment"). Thus, evaluating the existence of a continuing violation demands careful development and interpretation of the factual record.

At summary judgment, a Title VII plaintiff must raise a triable issue as to whether a current violation exists (*i.e.*, one within the limitations period). He must then demonstrate that conduct or events outside the statute of limitations are sufficiently related to the current violation to justify extending the reach of the statute. *See, e.g., Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995) ("[T]o assert a successful continuing violation claim, the facts alleged to have occurred within the [limitations] period must be 'related closely enough' to the prior acts such that they are to be considered one ongoing violation. . . . In other words, there must be a sufficient nexus. . . .") (citation omitted). However, Title VII courts have long regarded certain acts as sufficient to begin the running of the statue of limitations, such that a plaintiff may not avail himself of the continuing violations theory to resuscitate stale claims based on those acts. *See London v. Coopers & Lybrand*, 644 F.2d 811, 816 (9th Cir. 1981) ("[a]bsent special circumstances, a single act by an employer adverse to an employee's interests, such as a discharge, layoff, or failure to transfer or promote, begins the running of the statute of limitations and the natural effects of the allegedly discriminatory act are not regarded as 'continuing.'").

Petitioner urges that determining the existence of a continuing violation may be done without resort to and evaluation of the factual record. He is in error. The Ninth Circuit could not possibly have determined the existence of a

continuing violation without closely scrutinizing the evidence in the district court record. Petitioner's continuing violations theory is, at best, a mixed question of fact and law and wholly inappropriate for consideration at the appellate stage. Furthermore, even if it had been inclined to indulge Petitioner, the Ninth Circuit would have been impeded by an incomplete record for which Petitioner is himself responsible.

III. The Ninth Circuit Properly Applied The *De Novo* Standard Of Review.

Petitioner argues that the Ninth Circuit erred by refusing to reverse the district court's judgment based upon an argument he raised for the first time on appeal. In support of this assertion, Petitioner contends that circuit courts of appeal must reverse a summary judgment ruling based upon a theory not relied upon by the district court if the same circuit court also would affirm summary judgment under similar circumstances. *See Petition for Cert.*, 23-28. To its detriment, Petitioner's analysis simply ends there. Petitioner offers no authority to support his novel theory.[7]

Petitioner's theory of *de novo* review, while inventive, is nonsensical and should be disregarded. First, it finds no support in any decision of this Court or of any circuit court. Second, the cases that Petitioner cites as examples demonstrate a logical and fatal flaw in Petitioner's analysis.

Petitioner argues that if a circuit court will affirm summary judgment based on an altogether new theory, then it should also reverse based on a new theory. Petitioner's conclusion is wrong, however, because it flows from a false

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[7] The only authority that Petitioner does cite in favor of his contention comes from the syllabus of *Salve Regina College v. Russel*, 499 U.S. 225 (1991). *See Petition for Cert.*, 27. Petitioner cites to this syllabus in a perplexing discussion of the decisional accuracy of appellate courts.

premise: a court of appeal typically will *not* affirm on the basis of a newly-raised theory. *See* Section II., *supra*. Petitioner cites two cases to bolster his argument, but in neither case did the circuit court affirm based on a theory raised for the first time on appeal. In *Church of Scientology v. Cazares*, 638 F.2d 1272 (5th Cir. 1981), the Fifth Circuit affirmed summary judgment because it agreed with the district court that there were no genuine issues of material fact, even though the district court applied the wrong legal analysis to reach that conclusion.[8] In *Helena Rubinstein, Inc. v. Bau*, 433 F.2d 1021 (9th Cir. 1970), the Ninth Circuit affirmed summary judgment on a theory that was before, but not relied upon by the district court. The court considered no new arguments in its decision. *See Rubinstein*, 433 F.2d at 1023 ("[T]he ground upon which we rely was squarely presented to the trial court").

The true premise that can be derived from Petitioner's cited cases is merely the hornbook principle that a circuit court will affirm summary judgment if a theory raised below, but not relied upon by the district court, will support that judgment. Petitioner's proposed corollary theory that circuit courts should rely on altogether new arguments to reverse summary judgment makes no sense. Merely because a court will affirm summary judgment on an argument not relied upon by the district court, it does not follow that a court should reverse summary judgment based on an argument raised for the first time on appeal. In fact, the *Rubinstein* court stated explicitly that "[t]he general rule is that we will not consider, as grounds for reversal, contentions that were

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[8] Whereas the district court entered summary judgment because it felt plaintiff lacked standing to bring the suit, the Fifth Circuit affirmed because, upon review of the factual record, it found no genuine issues of material fact. *See Church of Scientology*, 638 F.2d at 1284.

never presented to the trial court." *See id.* at 1024 (citations omitted). There are no grounds upon which this Court should grant certiorari.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted.

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January 31, 1997

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-55204

C.D. No. CV-93-903-MRP

VINCENT MAXIMILIAN YEE, PLAINTIFF/APPELLANT,

v.

HUGHES AIRCRAFT COMPANY, LARRY SPICER, TERIAN DAY, GARY OSBORN, FRANK TAORMINA, STEVE DORFMAN, and SUE HUNGATE, DEFENDANTS/APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER, PRESIDING

TRANSCRIPT OF PROCEEDINGS

JULY 10, 1996

APPEARANCES OF COUNSEL:

For Plaintiff/Appellant:

HUTH, LYNETT & SCUDI
Morgan J.C. Scudi

For Defendants/Appellees:

LATHAM & WATKINS
Wayne S. Flick

JUDGE FERNANDEZ: I'd like to say that we are honored to have Judge Merhige from the Eastern District of Virginia here to help us give you speedy justice on the calendar. It really is an honor to have him with us.

JUDGE MERHIGE: Thank you. It's an honor to be here.

JUDGE FERNANDEZ: The one case on the calendar today -- is this working? It's all right? Okay. The one case on the calendar today, the matter of Colbertson v. Schubert, is scheduled to be submitted on the briefs. It will be ordered submitted on the briefs at this time.

Counsel, there is a clock there, I think, and if you all would try to watch the clock for your timing, I will try, when there's about two minutes of your time left, to do something like this. It neither means peace nor victory; it simply means you got two minutes left. I may forget. I might get so tied up in your argument that I forget about it or you may be looking somewhere else. So watch your own time. But I will try to give you a little hint when you've got just two minutes left.

The first case is Yee v. Hughes Aircraft. You may proceed.

MR. SCUDI: I'd request to reserve five minutes for rebuttal.

JUDGE FERNANDEZ: Watch your time and save it. I won't tell you when you're getting close to your five minutes, but watch your time and save it, and it's just fine. You may proceed.

MR. SCUDI: Thank you. May it please the court, this is a Title VII termination case in which the appellant seeks reinstatement. It's brought by a citizen of the United States of Korean and Chinese heritage, Mr. Yee. We also have a

breach of employment contract cause on appeal, and we have a breach of the implied covenant of good faith and fair dealing, also on appeal. We believe, in terms of the facts below, this was granted on summary judgment so it is de novo before the court; that we have established, at least in terms of triable issues of fact, that there has been discrimination and retaliatory discharge against Mr. Yee by Hughes. And we have overcome the hurdle of the reduction in force in that it is offered as a pretext, and we believe we have established facts sufficient to go to trial on those issues.

Also on appeal is an issue with regard to the jurisdictional limit of the Title VII claim. The court should be aware from the briefs that Mr. Yee was reinstated by district court order in 1989 for prior discrimination, which specifically was found to have been -- have included the wrongful changes of the appraisal evaluations by the department of human resources in order to effectuate that termination.

JUDGE FERNANDEZ: But the ultimate conclusion was not changed, was it? They changed the phraseology. They didn't change the ultimate conclusion.

MR. SCUDI: Your Honor, we're now -- I'm just going back in history in terms of the 1989 ruling of the district court where they reinstated Mr. Yee to Hughes. And at that time what they found was that Hughes had discriminated and that the human resources department, the head of the human resources department, had altered his evaluations and appraisals in a discriminatory manner in order to terminate, and therefore he was ordered reinstated in 1989.

So it's in that context that this case begins.

So we have Mr. Yee reinstated to Hughes in 1989 with an admonition that he's not to be discriminated against

and that he can only be terminated for just cause. And now we are looking at from 1989 until -- rather, May of 1989 until 1992, September of '92, when Hughes provided a layoff notification.

So the entire framework within terms of this case is -- involves three evaluations: 1989, 1990 and 1991. We believe that we have shown a continuing pattern on the part of Hughes with regard to the evaluations because they used the evaluations in the ratings given to Mr. Yee in the term- -- ultimate termination decision.

JUDGE FERNANDEZ: Here's the thing that I think you have -- one needs to focus on, though, or you need to focus on.

At the district court level on -- let's say on the termination level, the paperwork and the argument presented to the district court did not say that. It said, as far as I can read it, that the retaliation was retaliation for filing his later 1992, I think it was, claim. It didn't make the argument to the court that that was the situation. As a matter of fact, on their summary judgment motion, it seems to me the only argument made was: Well, you should have chosen someone else. I think it was, like, a three-page response, and it said: You should have chosen someone else. That's kind of by way of saying: I understand your argument to us now, what you're saying now.

MR. SCUDI: Yes.

JUDGE FERNANDEZ: The problem is -- or the thing that, you know, you need to sharpen is: How do we know that that's what was in front of the district court? In order words, the court was told: The problem with this termination is that you've discriminated against Asians in general, and maybe there was somebody else you should have terminated instead.

And the court said: No, that's just not true. That's not demonstrated. And it ruled. Why should we go beyond that in considering this case, or would we be going beyond that if we consider it?

That was a whole lot of questions at once. Would you like me to break it up?

MR. SCUDI: I know. I will try to address that, if I may, and I think it's a very important issue.

Here, I think, we are dealing with fundamental rights, and I think that the record that we have in front of the court of appeals is exactly the same record that was in front of the trial court. Obviously, we have different counsel, and hopefully our briefs are a little more sufficient. However, the facts were there. They were all there. All of the ones that we rely on were in front of the court. And this court is reviewing against its summary judgment, and it's on the causes of action as pled. All of the causes were pled in the EEOC complaint; and in the cause of action, retaliation was alleged in the termination, and not the retaliation that may have been covered in the brief, but it was in the complaint.

JUDGE FERNANDEZ: Well, let me put it more sharply then.

Is it your position that when one is faced with a summary judgment motion in district court, and we have this great infrangible mass of facts and evidence and stuff out there, and the person goes to the district judge and says, "Judge, my argument is my opposition to summary judgment is X," and the judge says, "I'm sorry, you lose," is it your position that in that situation, then, you kind of use that as a pass key and now you come to the court of appeals and you go back into the whole mass and you say, "I've got Y, Z, A, B and C that I want you folks to decide ab initio on summary

judgment." Is that your position, that that's an appropriate -- never mind the word appropriate. Is that your position?

MR. SCUDI: It is my position, Your Honor --

JUDGE FERNANDEZ: Okay.

MR. SCUDI: -- that the court has jurisdiction to do that. The rules are quite specific in terms of the record below that the court may rely upon. Also, I believe in our reply brief we cite to the fact that, with regard to a fundamental right, the court has a broad power to do some justice here. And we're not asking the court to go outside of what was before the trial court. We are asking the court to go outside what was in the brief of the attorney representing the appellant.

JUDGE FERNANDEZ: In other words, you are saying that if one looked at this whole case on both pieces of the summary judgment, one can trick out -- and I don't mean that in a negative sense -- but one can trick out a continuing violation claim stemming from the original district court Title VII case; and when one tricks that all out, one can bring in the 1989 and 1990 activities, and one can bring it all the way forward and say this termination is really a piece of that; right? That's your position?

MR. SCUDI: That's correct. That's precisely our position.

JUDGE FERNANDEZ: I understand it.

MR. SCUDI: Okay. And we believe that it is a continuing violation. I think, touching on that point --

JUDGE MERHIGE: You are telling me that it may well be. That thought occurred to me as I read the briefs. But the trial court was never informed that there was any contention of that. There's one statement in there, I believe, that said they've always been -- they've always discriminated,

something to that effect; but the court had no opportunity to rule on whether it was a continuing violation. I realize it was pro se, I believe.

MR. SCUDI: On the matter of the notice of appeal, he was represented --

JUDGE MERHIGE: Well, there's even less excuse then.

MR. SCUDI: Well, Your Honor, but if you review the declarations of Vincent Yee, that is where the facts are laid out. All of the facts that are necessary to rule --

JUDGE MERHIGE: Why didn't they say that to the trial court?

MR. SCUDI: But that -- they were supplied to the trial court. They weren't covered in the brief. Counsel for Hughes is very sophisticated and has given you the rather --

JUDGE MERHIGE: Well, you are not bad yourself.

MR. SCUDI: Well, thank you, Your Honor.

But my point is, you know from sitting on the bench that when you have a brief and you have declarations, the Hughes declarations here in California instead of affidavits, that you rely on the brief and the argument of counsel, but you go right to the declarations. The first thing you should be looking at are the facts that's before you. What is it that you're considering in terms of granting summary judgment? And as a jurist, when you read the facts that are laid out here, the declarations of Vincent Yee that were presented to the court, the evaluations and all of those facts that were in front of the court were sufficient; that sitting alone and reading them, you wouldn't know that summary judgment was not proper.

Now, counsel's brief may have been two or three pages, but it relied upon the declarations. And we have

submitted in our appendix those very same declarations, and all of the declarations that were supplied to the court are the ones that we rely on in our brief. So the judge, in looking at the summary judgment, had the very declarations that we're arguing here. What the judge did not have was the benefit of, shall we say, an exhaustive brief on the subject. But he or she certainly had all of the facts. And he or she, having the facts in front of it, and I believe it was a she, certainly had the power to look with a careful eye at the argument that was being made by Hughes because it's disputed facts that give rise to a denial of a motion for summary judgment.

JUDGE FERNANDEZ: Well, the difficulty is, structurally, you know, I know we're talking about this wonderful thing of jurists with incredible amounts of time to ferrite everything out; but, you know, everybody depends on lawyers to tell them what the issues in the case are. And I am sure Judge Pfaelzer, who is an incredibly good and an incredibly precise judge, depended on, you know, something, I suppose, like this: You can look in an -- in the whole world, you can look at a mass of facts, but somebody has to tell you what the issues are; and if nobody is disputing particular issues, that's a problem.

Let me ask it this way: If we adopt your position, then I think you would say it's pretty clear we need to reverse. If we do not adopt your position, what's clear then?

MR. SCUDI: An un- -- that an unjust result occurs.

JUDGE FERNANDEZ: In other words, we should not reverse. We would -- in your view, we would adopt an injustice; but we if we didn't say it can now be resurrected now, is it pretty clear -- I'm not -- you don't have to give this up; I won't take it as an admission; but is it fairly clear that these issues weren't really presented to the district judge?

MR. SCUDI: I believe they were presented.

JUDGE FERNANDEZ: Okay.

MR. SCUDI: I believe every one of the issues were presented to the judge, albeit not in --

JUDGE FERNANDEZ: Well, I mean, as opposed to in -- that the facts should have just emanated like a miasma rising out of the facts, the judge should have known it.

MR. SCUDI: No, I believe that if you look at the complaint and if you look at the pleadings, every single issue is raised. They were not raised, you know, and I think the court, in reviewing issues, knows that they -- at least they were raised. They were raised in the brief and they were raised in the declarations and they were raised in the complaint. And so we don't have an issue --

JUDGE TASHIMA: When you say "raised," you mean the brief says: "We contend that there was a continuing violation"?

MR. SCUDI: There is at least the mention of the continuation, yes. Either that -- either in the brief or in the oral argument.

JUDGE TASHIMA: One of the things you didn't -- maybe we can attack this differently.

Another reason for requiring, you know, some kind of notice of the issues you're raising is to give the other side a chance to file opposition. In other words, if it's not fairly raised, the party won't file opposition. Who knows what kind of affidavit the other side might have filed if they thought an issue was raised that they thought was not raised.

Now, but you have not really replied directly to the argument made by your opponent on page 17 of their brief, which cites the general rule about the appellate court not

considering an issue unless it was expressly raised and considered by the trial court. You want to reply to that now?

MR. SCUDI: Yes, Your Honor.

JUDGE TASHIMA: Are you saying we should disregard that rule or it doesn't apply?

MR. SCUDI: Your Honor, in our reply brief, I believe we addressed that.

JUDGE TASHIMA: You mention none of those cases at all. You never mention Singleton, Brooks, Whittaker, Scott.

MR. SCUDI: Well, I believe we cited Silver v. Mendel out of the Third Circuit, and we cited United States v. Yee --

JUDGE TASHIMA: You're saying we should disregard Ninth Circuit law and involve the Third Circuit?

MR. SCUDI: I would never suggest that you disregard Ninth Circuit law, Your Honor.

JUDGE FERNANDEZ: I'm sorry?

MR. SCUDI: I would not suggest you disregard Ninth Circuit law. What I would suggest, Your Honor, is that the -- you know, I'm going to reserve some time, Your Honor. I'm going to look on my rebuttal, if you wouldn't mind. I'll address that issue.

JUDGE FERNANDEZ: Surely.

MR. SCUDI: Thank you.

MR. FLICK: Good morning, Your Honor. Wayne Flick of Latham & Watkins on behalf of Hughes. If you'll forgive me, I have a little bit of a cold this morning.

May it please the court, as much as anything else, this is a case about rules. And I believe that there is actually one rule about which the parties agree. At page 10 of Mr.

Yee's reply brief, he cites to this court's 1994 decision in Schneider v. San Diego, which in turn relies upon the court's 1990 decision in Brogun v. San Mateo. And as Mr. Yee points out, and as those cases hold, this court's review is limited to the record that was presented to the district court at the time of summary judgment. And if I may also refer to what many of us, Judge Tashima, regard as the Bible, there is a statement in the Federal Practice Guide which says that the court is not obligated to consider matters not specifically brought to its attention. It is immaterial that helpful evidence may be located somewhere in the record. And I think that really goes to the heart of this case and it's critical to the outcome.

JUDGE FERNANDEZ: You notice the word "obligated" that you just said to us.

MR. FLICK: Yes.

JUDGE FERNANDEZ: Suppose we say, "Oh, well, we may not be obligated, but we surely aren't disempowered," and I say suppose by way of posing a question that I pose the reverse of to opposing counsel. Suppose we did say, "Oh, well, we can figure out a continuing violation from the facts of this case, and we can figure out that there is some evidence to suggest that if one only presented the issue properly. And so that's what we think was going on here." What happens then to your side of the case?

MR. FLICK: May I answer that question, Your Honor, by addressing some of the specific issues that I think this court would then have to look to if it were going to disregard that?

JUDGE FERNANDEZ: Sure, as long as you answer the question.

MR. FLICK: Yes, I will. I hope so.

Let me start first with the 1989 and 1990 performance appraisals.

JUDGE FERNANDEZ: Right.

MR. FLICK: As we've said in our brief, they were time barred by the time Mr. Yee filed his first EEOC charge. In order to resuscitate them, the court would have to apply the continuing violations doctrine, which I believe was raised for the first time on appeal. Even, however, if the court decided to do that -- whether or not the court decides to do that, I think that there is a more compelling reason why the court should disregard those performance appraisals, because in the court below, in response to the first summary judgment motion, Mr. Yee unambiguously conceded any issue of discrimination with respect to those two performance appraisals. At page 3 of his opposition memorandum, which is contained in supplemental excerpts number 3, he says -- and mind you, this in the midst of discussing the promotion -- or the alleged promotion decision with respect to Mr. Tormina's division -- he says, "Please note that there are no other parts of his complaint which allege that he was also discriminated against by defendants in 1989 and 1990." No other parts.

Now, in reliance on that, Hughes, in its reply memorandum, said to Judge Pfaelzer, summary judgment is not necessary with respect to those two performance appraisals. We also submitted an amended statement of proposed uncontroverted facts which now omitted any reference to them. And Judge Pfaelzer, in her order granting summary judgment, crossed out the portion of that order, which we had proposed, which related to those performance appraisals. I cannot -- I think it's difficult to imagine a clearer case of conceding an issue than what Mr. Yee did with respect to those two performance appraisals.

JUDGE FERNANDEZ: Then there's the promotion.

MR. FLICK: Pardon?

JUDGE FERNANDEZ: Then there's the promotion. The 1990 promotion?

MR. FLICK: Then there's the decision with respect to the promotion.

Now, again, the district court applied Delaware State College v. Ricks to conclude that the statute of limitations began running at the time that decision was made and at the time it was communicated to him, which was in May of 1990. He didn't file his first EEOC charge until over two years later.

There's a decision which is -- was not brought to the attention of the district court, and it is inexplicably omitted from my brief as well. It's this court's 1994 decision in Fobbs v. Holy Cross Health System. It's at 29 F.3d 1439.

JUDGE FERNANDEZ: Give us a so-called gum sheet on that, will you please?

MR. FLICK: It's simply --

JUDGE FERNANDEZ: Give the clerk --

MR. FLICK: Oh, yes. Sure.

JUDGE FERNANDEZ: Give the clerk a little paper that has that written out, and then we'll have it. That's how we take additional things.

MR. FLICK: Certainly. In Fobbs, the Ninth Circuit applied Delaware State College v. Ricks in a context that is very similar to what was presented to the Supreme Court in Ricks and said that the statute of limitations begins to run when a decision such as a promotion or a transfer is made and communicated, and that the use of an internal grievance procedure does not in any way toll that statute of limitations.

I think those two cases make clear that the issue of that decision was time barred. However, if the court then decides that it's appropriate to apply the continuing violations theory, to resuscitate any allegation with respect to that decision, I think what this court said in Coopers & Lybrand, which is cited in our brief, disposes of that issue. This court said that, absent special circumstances, a single act by an employer, such as a discharge, a layoff or a failure to transfer or promote, begins the running of the statute of limitations; and any effects of that allegedly discriminatory act are not to be regarded as continuing. And that's because a decision such as a failure to promote or to transfer or a layoff or a discharge is a discrete decision. One reasonably should know at the time a decision like that is made and implemented that it was discriminatory, if in fact it was. And it is incumbent upon the person involved to file a charge and to file a lawsuit.

So now whether the court decides that in fact Judge Pfaelzer was correct in applying Ricks and simply found that decision to be time barred or whether the court decides to apply the newly raised continuing violations theory here, I think under this court's precedence, the continuing violations theory won't save that decision, and therefore it should not be considered.

That then takes us to where Your Honors began with Mr. Scudi, with the layoff and what was presented to the district court in the second motion. You've read the two-page opposition memorandum to our summary judgment motion, and I know that that was the second opposition memorandum.

Over Hughes' objections, Judge Pfaelzer permitted Mr. Yee, at the hearing on that motion, two more weeks to provide another opposition memorandum because his first was nonresponsive. That brief does not argue continuing violations; it does not argue retaliation. And I would note,

Your Honor, that the only place I see retaliation anywhere in the record below is in the introductory paragraph of the complaint. It is never elsewhere argued. The only thing Mr. Yee said in that opposition memorandum was that he should have been compared to different people for the purposes of the layoff.

I think in certain respects, Judge Merhige, this is much like the case that was presented to you in 1994, the Travelers decision, where you noted in that decision that in a case such as this, in order to rebut the defendant's legitimate non-discriminatory reason, the plaintiff has to -- applying the Supreme Court's decision in Hicks, the plaintiff has to show that the articulated reason was false and show that the decision was in fact based upon discrimination. And you noted in a footnote on that decision, Your Honor, that the plaintiff had admitted that there was no direct evidence of discrimination.

In our opposition brief at page 31, I quoted from a passage -- I quoted a passage from Mr. Yee's deposition.

> "Q I'm asking you about the facts that support your allegation, not about what might have happened or what could have happened. So I'd like to know what facts you are aware of that supports your allegation that you were discriminated against when you were laid off in November 1992.
>
> "A I don't recall at this point. I don't recall."

Well, apparently when he filed his opposition memorandum, he didn't recall either, because he didn't present any evidence to the district court.

JUDGE FERNANDEZ: Well, suppose he says now: Look, Judges. Here's what happened. Judge Pfaelzer ordered me reinstated way back when, in that other Title VII action, so

we know these folks are bad actors. They had to be beat up once and we're back at it again. Now, when they came to make their layoff decision, the layoff decision was based upon my evaluations, my record and such.

MR. FLICK: Sure.

JUDGE FERNANDEZ: And every one of those would go down like this: First, I get a bad evaluation and it's really because I squawked the first time. Then I get a second bad evaluation because I squawked the second time. And now I got a third one 'cause I squawked a third time. And so I've got a bunch of junk in my file that makes me look bad, and so I got laid off. And all of that is based upon this continuing violation of my rights. Each time they're discriminating against me, and the ultimate discrimination becomes when they lay me off.

And that's his argument. What do you want to say to that?

MR. FLICK: Let me respond in two ways. Number one, it is, of course, not an argument that was presented below. But more importantly, let's look back -- forget all of my legal arguments and let's look back at the substance of those appraisals.

The first two appraisals, the 1989 and the 1990, Your Honor, you just characterized them as bad. He received overall evaluations of "meets Hughes' expectations." There's no dispute that, substantively, his performance was good. Both of his supervisors, who authored both of those evaluations, I think, candidly knowing Mr. Yee, rightly concluded that he was difficulty with authority, he was argumentative, he was resistant to any sort of constructive criticism; and as he even said in his deposition, he always believed that he did the job just as well as the CEO could do

it. And that was the demeanor with which he approached all decisions and contacts with managers. And --

JUDGE FERNANDEZ: "Meets expectations," like a C; right?

MR. FLICK: Pardon?

JUDGE FERNANDEZ: "Meets expectations," if we were in an old-fashioned school setting, that's like a C; right? And then you could get a B, which is a little higher; and you can get an A; or you could get a D, which means that you're on the verge of flunking out.

MR. FLICK: Or an F.

JUDGE FERNANDEZ: Or an F; right?

MR. FLICK: That's correct.

JUDGE FERNANDEZ: So "meets expectations" is sort of a C.

MR. FLICK: That's correct.

And Susan Goland, the human resources consultant who ultimately passed on the layoff, tells the court in her declaration that a "meets Hughes' expectations" is average. Mr. Yee, on the other hand, contends that it's somehow a blacklist. There's no evidence in the record.

So I would first say that those two performance appraisals were not bad appraisals, and there's no real evidence that there was any effort, either by Mr. Brown or by Mr. Bilderback, to downgrade him because of the former lawsuit.

At most, I think what we have here is a difference of opinion between Mr. Yee and those two supervisors with regard to the overall quality of his performance. And I think that explains why, in the district court, he conceded any issue

of discrimination in those two evaluations. I think it is an enormous leap for this court to reach over that concession, to reach over the time bar, to reach over the continuing violations theory and find anything in those performance appraisals that supports a retaliation theory that was never advanced to the district court.

JUDGE FERNANDEZ: But if you're an A student and your professor says, you know, "I don't like Asians," and gives you a C, then one would get a kind of feeling that that was discriminatory; right?

MR. FLICK: Absolutely.

JUDGE FERNANDEZ: If you really are an "A" and they give you a "C." And so he grieves about that. I think he grieved about that.

MR. FLICK: But there's no evidence in the record that either Mr. Brown or Mr. Bilderback ever made such a decision -- or made such a statement that "I don't like Asians." And there's no evidence in the record that any of the individuals involved in the challenged decisions here were involved in what happened in Yee One.

JUDGE FERNANDEZ: How about "I don't like folks who aren't team players and who are always throwing sand in the gears," things along that line? "Don't like non-team players. You really ought to learn to be a team player instead of filing lawsuits. You really ought to stop grieving when I give you a C. You ought to stop grieving it because, if anything, that demonstrates you sure aren't a team player. You don't know how to take it like a man and better yourself. You're just a whiner." Right? How about that?

MR. FLICK: Your Honor, with all due respect, if this court can find any statement such as that in this record, then I

would urge reversal. There is no such statement in this record. No such evidence.

JUDGE TASHIMA: The fact of the matter was, didn't he have the lowest rating of the pool of people who were considered for the layoff?

MR. FLICK: He did in the 1991 performance appraisal. And now, if I may, I'd like to actually address that. Actually, I think I did.

I think I made the point that that -- no, I didn't.

The 1991 appraisal was never an issue in the court below. The first two were. And we talked about how the court disposed of it. The 1991 appraisal, like his first two, is not mentioned in his complaint. As a consequence, it was not the subject of either of the two summary judgment motions. It was never raised in either -- in any of the three opposition memoranda which Mr. Yee presented to the district court. It's not listed in his own statement of genuine issues of material fact at summary judgment. And there's no single reference to it in Judge Pfaelzer's 17-page order granting summary judgment. It was not an issue until we reached this court, and with all due respect to counsel, until Mr. Yee's new counsel decided that it was an essential factual matter that he needed to support the new continuing violations theory. There was no allegation below that that performance appraisal was discriminatory.

JUDGE TASHIMA: Let me change the focus just a little bit.

Even assuming plaintiff doesn't have a viable continuing violations theory because he didn't raise it in the district court, isn't it a fair argument to say that these earlier appraisals are evidence from which you can infer, you know, racial intent in his layoff later?

MR. FLICK: I think that's important --

JUDGE TASHIMA: Isn't that sufficient to overcome summary judgment on the Title VII layoff claim?

MR. FLICK: I think that's the important point, Your Honor. I think we need to distinguish between whether or not something can be a liability-creating event or whether it can be mere relevant evidence which the court can consider with respect to something that is not time barred.

With respect to the '89 and '90 performance appraisals, I think, we win on both issues. It cannot be a liability-creating event because of the reasons I've argued. It also can't be relevant evidence --

JUDGE TASHIMA: Why can't it be?

MR. FLICK: Because Mr. Yee conceded that there was no issue of discrimination. When Mr. Yee says, those appraisals --

JUDGE TASHIMA: You mean in his deposition?

MR. FLICK: In his opposition memorandum at summary judgment, he conceded the issue. So I don't see how this court could conceivably regard them as relevant to anything when he himself says they are not discriminatory. And since he never raised any issue in the court below with respect to the 1991 appraisal, I don't see what that could be relevant to. I think it's clever; it's a clever attempt to try and support the new continuing violations theory, but it was not raised below; and he never alleged that it was discriminatory. So to the extent that the court might consider whether or not they should be considered as relevant evidence, I think he himself has disposed of that argument.

If I may, Your Honor, I'd like to reserve my last three minutes to respond.

JUDGE FERNANDEZ: No. Could we go one, two, three, stop.

MR. FLICK: Okay. I think I've actually addressed all of the substantive issues. I just would close by saying that I recognize the factual and the legal backdrop against which this case, which we've come to call as Yee Two, stands. In my view, though, there was one district judge who was best positioned to consider all of Mr. Yee's allegations and the entire record that was before her against that backdrop. And it was Mariana Pfaelzer. And I think that the record below and the very detailed statements of uncontroverted facts and conclusions of law that she issued make very clear that she looked well beyond the mere two-page opposition memoranda that were submitted. That she did look to the entire record. And that she could find no triable issue. And I don't think that she had any choice but to grant summary judgment on that record.

JUDGE MERHIGE: The response to the motion for summary judgment was almost a giveaway, wasn't it?

MR. FLICK: Yes.

JUDGE MERHIGE: Practically admitted.

MR. FLICK: Yes. And to the extent that there was more to that response in the form of Mr. Yee's genuine statement of -- of -- the statement of genuine issues and material fact, the local rules for the Central District make very clear that that responsive statement has to cite to specific evidence that supports the fact that those are disputed and there is no citation to any evidence whatsoever in that document. It's a list of 10 or 11 restatements of the mere allegations that are in his complaint.

Thank you very much, Your Honors.

JUDGE FERNANDEZ: Thank you. Well, you reserved about four and a half minutes.

MR. SCUDI: Thank you, Your Honor.

There was no stipulation on the record. We reviewed the record in looking for the alleged stipulation conceding, and what we found was that there was a discussion on the record where counsel -- and we cited in our reply brief on page 6, where it basically says, you know, he's just beginning to learn about the performance appraisals. For example, they're used in layoffs. So he didn't really concede anything. What he said is, "I'm not quite sure what this is all about." That's what the counsel said. It's quoted on page 6 in our reply brief.

As to the issue about the question as to whether or not this court can go beyond what was raised in the briefs, on page 7 we cite the Donovan case out of the Ninth Circuit in 1980 for the proposition, at least, that with regard to issues of law like jurisdiction, the court can go beyond what was briefed if there's enough facts in there. So there are facts before the court that will allow it on the jurisdictional issue to go beyond the jurisdiction, saying that there's no continuing violation.

In addition, I would like to focus on the argument that the termination itself is in September of 1992; the EEOC complaint was filed in August 1992; and the denial of the grievance procedure in which -- involved the 1989 and 1990 appraisal evaluations did not occur until March of 1992. And so those three evaluations and the termination of Mr. Yee's in-house appeal in March are the basis upon which the ultimate determination was made to terminate Mr. Yee. And those give the court enough in, and of themselves, to meet a Title VII discrimination count. And, clearly, all of those things are within the record. And, clearly, all of those would

not be timed barred. However, by reviewing those things, it does bring back in, and you do look at, the evaluations from 1989 and 1990. And remember that those are performed the year after that evaluation.

I would also indicate to the court that, within its discretion, the case may be remanded for further proceedings; and that may be an alternative to a reversal.

JUDGE MERHIGE: If you're right, wouldn't that be the proper procedure?

MR. SCUDI: That would be the -- we would be delighted with that result, Your Honor. And we believe that it's justified in this case. And, really, if you look at -- I think if you look at Donovan and you could look at the line of cases in terms of the court of appeals looking at issues of law and reviewing the factual records before them, we're not asking the court to go beyond its power. We're not asking the court to go beyond what's dictated in the Ninth Circuit with regard to the review. But we are asking the court, because this is a fundamental right, we are asking the court to take a close look at this. It is discrimination against a minority. And as a result, we are asking the court, then, to remand this matter.

I would also indicate that certainly in terms of the time issues with regard to the breach of the covenant of good faith and fair dealing in the 1981 action for breach of contract, those claims are not time barred. And so you really don't have to address those issues in terms of the time-barred ruling with regard to continuing violation. And we believe that we've established at least issues of fact as to all those as well.

So we would ask the court -- cordially ask the court to remand this for further proceedings. Thank you.

JUDGE FERNANDEZ: Thank you, counsel. This matter will stand submitted.

(End of tape.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I, Daisy H. Eng, Certified Shorthand Reporter, Certificate No. 6593, for the State of California, hereby certify:

I transcribed to the best of my ability the audio tape in the foregoing matter.

Dated: January 24, 1997.

DAISY H. ENG
Certified Shorthand Reporter No. 6593